N. 2928

No. 14656

# United States Court of Appeals

## For the Ninth Circuit

See vol. 2, 2926-2927

HANS FORSTER, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

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## BRIEF OF APPELLANT

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TRACY E. GRIFFIN,
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THE ARGUS PRESS, SEATTLE

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

## BRIEF OF APPELLANT

### STATEMENT OF JURISDICTION

The appellant Forster, L. Hicks Taylor and Harold Erickson were indicted in nine counts under 26 U.S.C. 145(b) (R. 3-10). Appellant entered a plea of not guilty (R. 19). Appellant was found guilty by the jury verdict rendered on May 14, 1954 (R. 15-16). Appellant filed a motion for a new trial (R. 16-17) which the trial court denied (R. 17-18). Judgment, sentence and commitment were entered by the trial court on June 8, 1954 (R. 18-22).

Appeal from this final judgment to this Court is pursuant to 28 U.S.C. 1291 and 18 U.S.C. 3772. Appellant filed notice of appeal on June 11, 1954 (R. 22-24) pursuant to Federal Rule of Criminal Procedure 37 and has perfected this appeal pursuant to Federal Rule of Criminal Procedure 39 and the rules of this court.

## STATEMENT OF THE CASE

### A. Hans Forster and L. Hicks Taylor

Hans Forster (hereinafter referred to as "appellant") was born in Switzerland in 1904 and was a journeyman cheesemaker when he came to the United States in 1925. His first independent cheesemaking operation was burned out and he took a job with the Issaquah Creamery Company in Issaquah, Washington. His first job there was washing milk cans and later he renewed his cheesemaking operation for the company (R. 829-852).

L. Hicks Taylor was an accountant in independent practice since 1919 (R. 1504), who began regular accounting work for Issaquah Creamery Company in 1928 (R. 1510) while appellant was employed there. He maintained the general ledger of Issaquah Creamery Company, prepared the tax returns and performed numerous other services (R. 1517-1526).

Appellant acquired an interest in Issaquah Creamery Company in 1929 when the company was in distress (R. 853-869). Taylor continued to be in charge of accounting, to make up the tax returns and became secretary and a director of the company (R. 883).

In the middle thirties appellant acquired an interest in Simonson and Forster, Inc., in Puyallup, Washington. Taylor assisted in negotiating the acquisition and drafted the necessary papers for incorporation. He set up the books of the new enterprise and became secretary and treasurer (R. 871-874).

In the thirties appellant developed a fresh milk business in the City of Seattle as an auxiliary to the cream-

ery plant in Issaquah. In 1940 the fresh milk operation was severed from Issaquah Creamery Company and became a sole proprietorship, Alpine Dairy, upon the advice of Taylor who selected attorneys to handle the separation. Appellant participated in none of the negotiations. The books and bookkeeping department of Alpine Dairy were set up by Taylor (R. 881-887).

In 1943 appellant acquired a one-third interest in Renton Ice and Ice Cream Company in Renton, Washington. Taylor negotiated this transaction on behalf of appellant, took over the supervision of the books and records of the company and became secretary, treasurer and a director from the date of its incorporation (R. 893-896).

Taylor also advised appellant as to the acquisition of Finstad & Utgard, Inc., in 1944. He examined the books prior to the purchase and after the purchase set up a new bookkeeping system and made the necessary arrangements for the purchase contract. Taylor became secretary-treasurer of this company (R. 896-901).

Daisy Ice Cream Company was owned by a client of Taylor's who thereby learned that it was for sale. On behalf of appellant, he negotiated appellant's acquisition of this concern which appellant viewed as a subsidiary of Alpine Dairy. Taylor gave the initial instructions as to accounting and deposit of funds for this operation and appellant looked to him for the supervision of its accounting operations (R. 902-908).

Arctic Gardens was a corporation formed for the distribution of frozen foods. Taylor represented appellant's interest in this corporation as an incorporator

and as secretary-treasurer and, in addition, not only inaugurated the bookkeeping system, but actually kept all of the books and records of the company until in 1949, the company gave up the frozen food operation, changed its name to Alpine Ice Cream Company and took over the former Daisy Ice Cream Company operation (R. 909-911).

In 1945 appellant acquired an interest in Apex Farms, Inc., another fresh milk distribution operation in Seattle. Taylor handled all of the accounting aspects of appellant's acquisition of this interest and kept all of the corporate records. Taylor became secretary-treasurer of the corporation (R. 911-914).

In August, 1948, Internal Revenue Agents commenced an investigation of the personal income tax returns of Taylor. On March 2, 1950, Taylor pleaded guilty to one count of tax evasion and served a prison sentence until September 10, 1950 (R. 1595-1597).

Appellant has never made up an income tax return. Until Taylor went to prison in 1950, all income tax returns which were ever filed by appellant, by his wife, or by any corporation in which he had an active interest were made up by Taylor. Appellant received no copies of these returns (R. 969-971). Appellant signed the tax returns but did not read them and paid the amount of tax determined by Taylor (R. 1016). Appellant was himself unacquainted with Federal tax laws and the tax consequences of business transactions and relied upon Taylor in those matters (R. 1401-1402).

**B. Origin of Shortages**

The shortages set forth in the nine counts of the indictment were not denied. Each defendant denied the element of willfulness. The shortages arose from failure to report certain receipts including: Sales of casein (R. 151-154); salary of appellant from Simonson and Forster (R. 161-162); appellant's share of salaries paid by Renton Ice and Ice Cream Company (R. 162-169); certain checks representing adjustment to milk prices and known as milk equalization checks (R. 175-176); rebates received on the purchase of oil and gasoline (R. 208-211); certain proceeds of the business of Daisy Ice Cream Company (R. 249-250); rental from appellant's farm (R. 256-257); certain discount checks to Alpine Dairy customers which were not delivered and returned to appellant (R. 176-180).

Personal expenses were charged to Issaquah Creamery Company and Alpine Dairy (R. 212-241).

In the books of Issaquah Creamery Company at the end of 1949, purchases and accounts payable were raised by approximately $80,000.00 (R. 242-245). Accounts payable of Renton Ice and Ice Cream Company for the month of July, 1947, were raised $9,000.00 by the device of adding nine "1's" in the accounts payable ledger (R. 2763-2767). Accounts payable at Finstad & Utgard were raised $10,000.00 in the December, 1947, statement (R. 411).

**C. Explanation of the Shortages**

The defenses of appellant and Taylor created a direct conflict in the testimony. Appellant testified that he had never made an income tax return, that Taylor had made

all personal and corporate returns ever filed by him up to the date of the termination of their relationship (R. 969-971). Appellant further testified that he felt all of his bookkeeping and accounting operations were under the supervision of Taylor and that Taylor knew more about his finances and financial situation than did appellant himself (R. 972-973). In all accounting and tax matters appellant placed complete trust and reliance upon Taylor (R. 971), who was the trustee of a trust established for appellant's children and who was executor under appellant's will (R. 964).

On the other hand Taylor testified that in general he maintained only general ledgers from which he prepared tax returns (R. 1517-1526). He testified that he maintained no personal books or records for appellant, was unacquainted with his savings accounts, did not know how his personal expenses were handled or charged, and was generally unacquainted with any information not contained in the general ledgers of the business enterprises (R. 1526-1545).

Taylor testified that the $80,000.00 increase in accounts payable of Issaquah Creamery Co. for 1949 was a figure supplied to him by Erickson, the bookkeeper, which Taylor unquestioningly accepted (R. 1553-1557). Erickson testified that he had inserted these figures into his books upon direct instructions from Taylor (R. 2564). Forster testified that he was entirely unacquainted with these book entries and first learned of them after Taylor had gone to prison and when a new accounting firm had been hired to make an audit (R. 955-956).

Schneider, the president of Renton Ice and Ice Cream Company, testified directly that he saw Taylor raise the accounts payable for July, 1947, by $9,000.00 (R. 2763-2767). Taylor denied that he had (R. 1571).

Taylor testified that he had not made the alteration of $10,000 in accounts payable in Exhibit A-44 at Finstad & Utgard (R. 2307, 2113-2115). Appellant's offer of proof through Egenes that he did not make the alterations was rejected (R. 2417-2419).

The foregoing necessarily outlines only a portion of the conflicts between the testimony of Taylor and his codefendants which arose in the course of the trial.

**D. How the Questions on Appeal Arose**

In his opening statement counsel for Taylor accused appellant and his attorney, George F. Kachlein, Jr., of fomenting a conspiracy to "frame" Taylor and to make him the scapegoat for appellant's tax shortages (R. 87-89). Appellant moved for a mistrial on the basis of these charges and the motion was denied (R. 93-95). Following the entry of the verdict appellant filed a motion for acquittal and in the alternative for a new trial naming as one of the grounds errors in law during the trial to which exception was duly taken (R. 16-17) (Specification of Errors 8, 9, 10).

The testimony showed that Taylor had submitted different financial statements to different persons for the same entity as of the same date (A complete outline of this testimony is contained at pp. 54-59, *infra.*). On cross-examination Taylor stated that this was a legitimate practice and that different financial statements could be made up for different purposes (R. 1958-1963).

In rebuttal appellant offered the contrary testimony of the bank officer, Strack, but the offered testimony was excluded (R. 2398) (Specification of Errors 2, 7).

In connection with a certain financial statement, Exhibit 252, Taylor testified that "cash" and "accounts receivable" were interchangeable (R. 2288, 2294). The issue went directly to Taylor's knowledge of appellant's cash position. Appellant offered the contrary testimony of bank officers Strack and Donaldson in rebuttal and this testimony was rejected (R. 2399, 2401) (Specification of Errors 3, 4, 7).

Taylor had denied knowledge of appellant's cash position. In rebuttal appellant offered the testimony of another bank officer, Ellis, to show a conference in 1948 at which Taylor disclosed knowledge of this cash (R. 2323, 2406); but the offer of proof was rejected (Specification of Errors 5, 7).

Taylor had testified that Egenes had made certain alterations to the books of Finstad & Utgard (R. 2307, 2113-2115). Appellant offered in rebuttal the testimony of Egenes that he had not made these alterations; and this testimony was rejected (R. 2417-2419) (Specification of Errors 6, 7).

Taylor testified that this alteration reflected a $10,000.00 bonus paid to shippers in the year 1947 (R. 2115, 2307). Appellant offered in rebuttal the testimony of Egenes that bonuses to shippers for that year totalled $2,139.55; and this offer was rejected (R. 2417-2419) (Specification of Errors 6, 7).

After the jury had retired to its deliberations, it sent a special request to the trial judge for an additional in-

terpretation of the word "willfully" as used in the instructions. The court submitted an additional instruction (R. 2674-2675) to which appellant objected and took exception (R. 2676); following this additional instruction, the jury brought in its verdict of guilty as to appellant (Specification of Errors 1, 10).

## SPECIFICATION OF ERRORS

1. The trial court erred in giving, in response to a special request by the jury for an interpretation of the word "willfully," the following additional instruction:

> "Now, to supplement that, as I say again, I am going to give you, in substance, the same matter.
>
> "When used in a criminal statute—that is, the word 'willful' or 'willfully'—when used in a criminal statute it generally means an act done with a bad purpose, without justifiable excuse, stubbornly, obstinately, perversely.
>
> "The word is also characterized—employed to characterize a thing done without ground for believing it lawful, or conduct marked by reckless disregard whether or not one has the right so to act.
>
> "That, I believe, Ladies and Gentlemen, covers the request as you have made it; and so, with that further instruction, you may now be excused and return and continue your deliberations." (R. 2674-2675)

To this additional instruction appellant took exception as follows:

> "I feel obligated—on behalf of the Defendant Forster to except to the use of each and every word in the new instruction just given by the Court and particularly that portion of it dealing with 'reckless disregard.'

"The instruction does not cover the use of 'good faith,' 'mistake' and rather stultifies the definition given the Jury originally on willfulness which, except for the use of the words 'reckless disregard' was a full and complete instruction in that particular as I view it." (R. 2676)

2. The trial court erred in sustaining objection to the following question addressed on direct examination to appellant's rebuttal witness Strack:

"Q. Mr. Strack, as a bank officer, will you accept and rely on a financial statement submitted by a borrower if you knew that the borrower had outstanding for the same date a different statement?" (R. 2398)

The question was "objected to as not proper rebuttal, and hypothetical" by counsel for appellee (R. 2398).

In support of the proposed testimony counsel for appellant stated:

"Your Honor, on Mr. Taylor's redirect examination, he expressed his views at length as to the purpose of financial statements and if rebuttal is not permitted as to those views, he becomes the final authority on that." (R. 2398) * * *

"Mr. Taylor testified with respect to the statements in the 30's that different statements had different purposes; that credit statements were different from income tax statements." (R. 2399)

3. The trial court erred in sustaining objection to the following question addressed on direct examination to appellant's rebuttal witness Strack:

"Now, Mr. Strack, will you state on a financial statement what is meant by 'cash'?" (R. 2399-2400)

This question was "objected to as not proper rebuttal" by counsel for appellee (R. 2400).

In support of the proposed testimony counsel for appellant stated:

> "Your Honor, this goes again to the statement of the cash on hand, and accounts receivable. I simply wish to ask this witness whether accounts receivable and cash may be interchanged." (R. 2400)

4. The trial court erred in sustaining objection to the following question addressed on direct examination to appellant's rebuttal witness Donaldson:

> "Mr. Donaldson, I will show you plaintiff's Exhibit 123, a financial statement of Hans Forster dated February 29, 1948, in which the entry for cash on hand and in banks is listed as $293,848.11. Will you state, as a banker, what the significance is to you of the entry 'cash on hand and in the banks'?" (R. 2401-2402)

This question was "objected to as not proper rebuttal" by counsel for appellee (R. 2402).

In support of the proposed testimony counsel for appellant stated:

> "The nature is that this was gone into on redirect on the testimony of Mr. Taylor and the significance of cash was explained and an opinion given as to the nature of cash on that sheet." (R. 2402)

5. The trial court erred in rejecting the following offer of proof by appellant's rebuttal witness Quentin Ellis:

> "The offer of proof will be, in substance, that Mr. Ellis phoned Mr. Taylor May 5, 1948, and discussed with him the financial statement dated Feb-

ruary 29, 1948, which had been submitted to the bank; that this was not a secret conference in any manner; that the specific items in the statement were discussed, and among them was the item of cash on hand, and in bank of $293,848.11; that Taylor stated to the witness that of the cash on hand and in the banks a part of it was Hans's personal cash, and the remainder belongs to the Alpine Dairy operation." (R. 2406)

To this offer counsel for appellee made the following objection:

"In the first place, our objection is that it is not proper rebuttal to the Government's case, and, secondly, it is my recollection of the evidence that Mr. Taylor did refer to a secret call to the bank. He didn't recall the party or name him, and then further, in cross-examination, these questions were propounded—about his secret call to the bank, the substance of it, and the cross-examination was about why it was secret, and along that line, as if there was some reason for the secrecy.

"Now, if I can propound an impeaching question and call a man who happens to be in the bank to answer the impeaching question, I don't see how that can be rebuttal to an issue." (R. 2408)

6. The trial court erred in rejecting the following offer of proof by appellant's rebuttal witness Vern Egenes:

"Mr. Taylor testified to the alteration of ten thousand dollars, or change of ten thousand dollars, he had charged to bonuses. He was examined in detail by his own counsel as to the fact that there were individuals or parties entitled to bonuses from various districts and including Snohomish County, as he testified.

"We offer to prove by the witness on the stand, with reference to this Exhibit A-122, and the testimony of Taylor, that with reference to this ten thousand dollars that he used for accounts payable as charged to bonuses, the bonus—the total bonus was $2,139.55, and that the named parties—individuals—upon this exhibit are the only ones that were entitled to bonuses and the amount is specified to which each is entitled, and then Mr. Taylor thereby used up some $7,860.45, chargeable he says, to bonuses, and the cold record shows that such was not the fact; and as to Exhibit A-44, Mr. Taylor had testified in effect changes shown thereon were made by the witness on the stand, we propose to show by the witness on the stand that such changes were not made by Mr. Egeness and my position is again, as long as your Honor is ruling, in regards to Mr. Ellis, that this is highly prejudicial to the defense of Mr. Forster." (R. 2417-2418)

Counsel for defendant Taylor objected to the above offer on the following ground:

"The entire matter is collateral, and concerns a corporation not named in the Indictment, and not a matter establishing the defense of Mr. Forster and not a matter that the Government is charging." (R. 2419-2420)

7. The trial court erred in refusing to grant appellant's motion to reopen the rebuttal testimony set forth in Assignments of Error 2 through 6 following the closing argument of counsel for the defendant Taylor (R. 2623-2626).

8. The trial court erred in overruling appellant's motion for a mistrial based upon charges contained in the

opening statement of counsel for defendant Taylor and directed against counsel for appellant (R. 93-95).

9. The trial court erred in failing to declare a mistrial at the close of the evidence based upon the prejudicial effect of charges brought by counsel for defendant Taylor against counsel for appellant which were wholly unsubstantiated by the proof.

10. The trial court erred in denying appellant's motion for acquittal and in the alternative for a new trial (R. 16-18).

## ARGUMENT

### Summary of Argument

1. At the special request of the jury one day after it had retired, the trial judge gave an additional instruction interpreting the word "willfully" as used in 26 U.S.C. 145(b) and the indictment based thereon. The additional instruction given was derived from *U. S. v. Murdock, infra,* a misdemeanor case decided under the predecessor to 26 U.S.C. 145 (a), and was given to the jury in such a manner as to establish a separate, alternate and erroneous standard of willfulness under Sec. 145(b), independent of the original instructions. The standard of willfulness in a felony case under Sec. 145(b) has been differentiated from the standard in a misdemeanor case under Sec. 145(a) by the Supreme Court in *Spies v. United States, infra.* Therefore, the additional instruction was erroneous, as this court held on both hearings of *Bloch v. United States, infra.* Since the giving of an erroneous instruction at the special request of the jury requires reversal, *Bollenbach v. U. S., infra,* the judgment below should be reversed.

2. Appellant offered the testimony of the witnesses Strack, Donaldson, Ellis and Egenes to rebut certain testimony given by the co-defendant Taylor when he was cross-examined by counsel for appellant. This offered rebuttal testimony was excluded on the ground that it concerned collateral matters raised on cross-examination. Appellant contends the issues he sought to rebut by this offered testimony were not collateral, but were fundamental to appellant's defense and admissible under the accepted rules of evidence. When counsel for Taylor argued to the jury that Taylor stood uncontradicted on the matters which appellant had sought to rebut, appellant moved to re-offer this rebuttal testimony, again contending that it was not collateral, and the testimony was again excluded. This exclusion of material, relevant and admissible testimony constitutes reversible error.

3. In his opening statement, counsel for the co-defendant Taylor charged a conspiracy by appellant's chief counsel, Kachlein, to make Taylor the scapegoat of appellant's tax deficiencies. Appellant moved for a mistrial before evidence was heard, contending that the charges and evidence outlined therein were irrelevant, incompetent and immaterial to any issue in the case, wholly prejudicial to appellant and the source of complete confusion of the issues. The motion was denied. No evidence offered by Taylor in any way substantiated the charges made and in fact the evidence conclusively showed the charges were baseless. The trial court was therefore under a duty to declare a mistrial at the conclusion of the evidence and, failing that, on appellant's motion for a new trial, because of the misconduct of

counsel for Taylor in injecting this false and prejudicial issue into the case. The failure of the trial court to declare a mistrial, either on appellant's motions or on the court's own motion, constitutes reversible error.

## I. The Trial Court's Additional Instruction on Willfulness Was Erroneous

### A. The additional instruction and the circumstances under which it was given

The trial judge instructed the jury on May 13, 1954. Those portions of the charge relating to the elements of the crime involved, intent and willfulness, are set forth in the margin.[1]

---

[1] "The essential elements of the crime or offense charged in each count of the Indictment are three:

(1) That there was owing to the Government more income tax than that shown in the return of the taxpayer for the particular taxable year in the applicable count of the Indictment;

(2) That the particular defendant knew that there was owing more income tax than that shown in the income tax returns; and

(3) That the particular defendant willfully attempted to evade or defeat part of such tax by filing or causing to be filed a false return. (R. 2655)

* * * * * * * *

"Those last two elements are the most important elements for your determination in this case and many of the following instructions will be devoted to clarifying to the best of my ability what the willfulness and knowledge as required in this case is or must be. (R. 2657)

* * * * * * * *

"The gist of the offense charged in the Indictment is willful attempt to evade or defeat the income tax imposed by the income tax law. The word 'attempt' as used in this law involves two elements:

The jury commenced its deliberations on the afternoon of May 13, 1954. The court was reconvened with the jury present at 11:35 a.m. on May 14, 1954, the judge having received the following request from the jury (R. 2674):

"The Jury wishes an interpretation of the word

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(1) an intent to evade or defeat the tax, and

(2) some act done in furtherance of such intent.

The word 'attempt' contemplates that a defendant had knowledge and understanding that during the calendar years 1945 to 1949, inclusive, Hans Forster, or in the case of Counts VI to IX, inclusive, the Issaquah Creamery Company during the years of 1946 to 1949, inclusive, had an income in such years which was taxable and which was required by law to be reported and that such defendant attempted to evade and defeat the tax thereon, or a portion thereof, by purposely causing the respective returns to exclude income which such defendants knew Hans Forster or Issaquah Creamery Company had received during the years in question, and which such defendants knew should be included in such returns.

"With respect to the offenses charged there must exist a union or joint operation of act and intent. The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt.

"A person is held to intend all the natural and probable consequences of acts knowingly done. That is to say, the law assumes a person to intend all the consequences which one standing in like circumstances and possessing like knowledge should reasonable expect to result from any act which is knowingly done.

"With respect to offenses such as charged in this case, proof of specific intent is required before there can be a conviction. Now, specific intent, as the term suggests, means more than a mere general intent to commit the act.

"A person who knowingly does an act which the law forbids, or who knowingly fails to do an act which the

'willfully' as used in the indictment. Harold F. Craft."

Thereupon the following proceedings took place:

"THE COURT: Ladies and Gentlemen of the Jury:

"In an effort to meet that request of yours the Court is going to first give you again the instruc-

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law requires, purposely intending to violate the law or recklessly disregarding the law, acts with specific intent." (R. 2657-2659)

* * * * * * * *

"You will note that the acts charged in the Indictment are alleged to have been done 'willfully and knowingly.'

"An act is done 'willfully' if done voluntarily and purposely and with a specific intent to do that which the law forbids.

" 'Willfulness' implies bad faith and an evil motive.

"An act is done 'knowingly' if done voluntarily and purposely and not because of mistake, inadvertence or some other innocent reason." (R. 2660)

* * * * * * * *

"The signing of an income tax return by a taxpayer makes it his return and if it is false and the taxpayer knows it to be false, he violates the law if he files it willfully and with an intent to evade the payment of his tax." (R. 2661)

* * * * * * * *

"Section 145(b) of the Internal Revenue Code punishes a willful attempt to evade and defeat taxes in any manner and so you may find that conduct such as keeping false books, making false entries in the books, failing to make entries in books, altering invoices or other records, concealment of assets, covering up sources of income, handling one's affairs to avoid the making of usual records and any conduct the likelihood of which would be to mislead or conceal as constituting an attempt to evade and defeat taxes." (R. 2666)

* * * * * * * *

tion I gave you yesterday as to willfully and another instruction that is related to it. I will supplement that with a little further statement which I think in essence is the same but probably stated differently. That is, with different words.

"Now I will give you the instruction as I gave it yesterday.

"You will note that the acts charged in the Indictment are alleged to have been done 'willfully and knowingly.'

"An act is done 'willfully' if done voluntarily and purposely and with a specific intent to do that which the law forbids. 'Willfullness' implies bad faith and an evil motive.

"An act is done 'knowingly' if done voluntarily and purposely and not because of mistake, inadvertence, or other innocent reason.

"Now, you will note I referred to specific intent and, therefore, will now read that to you again so that you will have that in mind.

"With respect to offenses such as charged in this case, proof of specific intent is required before there can be a conviction. Specific intent, as the term suggests, means more than a mere general intent to commit the act.

"A person who knowingly does an act which the law forbids, or who knowingly fails to do an act which the law requires, purposely intending to violate the law or recklessly disregarding the law, acts with specific intent.

"Now, to supplement that, as I say again, I am going to give you, in substance, the same matter.

"When used in a criminal statute—that is, the word 'willful' or 'willfully'—when used in a crimi-

nal statute it generally means an act done with a bad purpose, without justifiable excuse, stubbornly, obstinately, perversely.

"The word is also characterized-employed to characterize a thing done without ground for believing it lawful, or conduct marked by reckless disregard whether or not one has the right so to act.

"That, I believe, Ladies and Gentlemen, covers the request as you have made it; and so, with that further instruction, you may now be excused and return and continue your deliberations." (R. 2674-2675)

Thus, it will be seen that the additional instruction, to which appellant duly excepted,[2] was given under extraordinary circumstances. In accordance with the procedure of the trial court, the jury was not furnished with a written copy of the instructions. The additional instruction was given after the jury had deliberated approximately a full day. During that period it is obvious that the jury was unable to reach any decision.

The entire record makes it clear that appellant at no time denied the existence of large deficiencies in the

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[2] "I feel obligated—on behalf of the Defendant Forster to except to the use of each and every word in the new instruction just given by the Court and particularly that portion of it dealing with 'reckless disregard.'

"The instruction does not cover the use of 'good faith,' 'mistake' and rather stultifies the definition given the jury originally on willfulness which, except for the use of the words 'reckless disregard' was a full and complete instruction in that particular as I view it." (R. 2676)

payment of tax. This was conceded from the start. Appellant vigorously insisted that he had at all times made a complete disclosure of all his books and records to Government agents and had provided large scale accounting assistance to the Government in order to determine the extent of the deficiencies, which he was ready and willing to pay. Appellant's defense was a complete denial of the element of willfulness or any intent to evade tax or defraud the revenue.

That the jury correctly apprehended the nature of this defense is made vividly clear by their request for additional instruction on the meaning of "willfully." The jury correctly understood that this was the crux of the case and that upon the issue of willfulness the guilt or innocence of the defendants, including appellant, must be determined. The additional instruction given by the court must, therefore, be viewed as the determining and decisive factor in this case.

In this respect, this case differs clearly from any of the cases hereinafter cited. The issue here cannot be whether the instructions, taken as a whole, were correct. The instructions were not taken as a whole; to the contrary, the specific point fundamental to its decision was raised by the jury and after the court had given its additional erroneous instruction, the jury returned its verdict of guilty as to appellant. That verdict was rendered at 9:15 p.m. of the same day on which the additional instruction had been given.

**B. This court, in the *Bloch* case, declared the additional instruction on willfulness to be erroneous**

In *Bloch v. United States* (C.A. 9, 1955) 221 F.(2d)

786, 789, 790, the trial court gave the following instruction:

> "Willfully in the statute, which makes a willful attempt to evade taxes a crime, refers to the state of mind in which the act of evasion was done. *It includes several states of mind, any one of which may be the willfulness to make up the crime.*
>
> *"Willfulness includes doing an act with a bad purpose. It includes doing an act without a justifiable excuse. It includes doing an act without ground for believing that the act is lawful. It also includes doing an act with a careless disregard for whether or not one has the right so to act."*

This court declared the italicized portion of the above instruction to be erroneous.[3]

A comparison of the version of the *Murdock* instruction used in the *Bloch* case and the version used in the instant case shows that the instruction with which we are concerned is even weaker and more open to attack than that which was declared as error in the *Bloch* case. The vital difference is that in the *Bloch* case, the trial court, introductory to its definition, restricted the definition to " . . . the statute, which makes a willful attempt to evade taxes a crime . . . " and tells the jury that the word " . . . refers to the state of mind *in which the act of evasion was done"* (Emphasis supplied).

The trial judge in the instant case merely defined the

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[3] This instruction was taken from the language of the United States Supreme Court in *U. S. v. Murdock,* 290 U.S. 389, 394, a case involving a misdemeanor and not a felony statute. That case is fully discussed, *infra* 25; and for purposes of convenience, this instruction will be referred to as the "*Murdock* instruction."

word willfully "when used in a criminal statute . . . " and emphasized that his definition was a general definition by repeating twice the words "when used in a criminal statute . . . " Thus, the trial judge did not even purport to tie his definition to the tax evasion statute under which the indictment was brought.

But even after the statement in the *Bloch* case that the definition given applies to the statute which makes a willful attempt to evade taxes a crime and refers to a state of mind in which the act of evasion was done, this court found the *Bloch* instruction erroneous. Why?

The court noted that the *Murdock* case was one in which the defendant was indicted for refusal to give testimony and supply information as to deductions claimed in his tax returns for moneys paid to others in violation of Sec. 1114 (a) of the Revenue Act of 1926, and Sec. 146(a) of the Revenue Act of 1928. This court found that the *Murdock* case

> " . . . does not apply the definition 'willfully' used by the trial court in the instant Section 145(b) case."

This court went on to say:

> "In this Section 145(b) tax evasion case there is only one state of mind that will supply the intent necessary to sustain a conviction, and that is the intent to defeat or evade the payment of the tax due. Nor would filing a false return with any bad purpose supply the necessary intent. The bad purpose must be to evade or defeat the payment of the income tax that is due. Nor would filing a false return without a justifiable excuse or without ground for believing it to be lawful or with a careless disregard for whether or not one has the right so to do

constitute in themselves the intent which is required under the section. See Hargrove v. U. S., * * *, wherein the Court discussed and distinguished the element of intent necessary under different statutes. See also U. S. v. Martell, * * *.

"These errors in the instruction are plain and affect substantial rights of the defendant and the fairness of the trial and require a reversal of the case." (citations omitted)

The same *Bloch* case was again before this court upon petition for rehearing. 223 F.(2d) 297, 298 (C.A. 9, 1955). Here this court made clear the basis of its original decision when it said:

"The Government then suggests that since it concedes that a reversal of the appellant's conviction is proper, we should re-examine what we have to say upon the instruction concerning willfulness which we held was plain error and which constituted the basis of our judgment of reversal."

This court denied the petition for rehearing and stated:

"The instruction with which we are concerned goes to the intent, an essential element of the offense."

This court referred to other cases which will hereinafter be fully discussed. But it correctly concluded that those cases could not be controlling:

"But each case presents a problem by itself. We are not called upon here to express our views as to whether this obviously questionable language was or was not prejudicially erroneous when read in the context of all the other instructions given in the Bateman and the Legatos cases. All that we have held here is that the language of the court criticized was in and of itself erroneous, and in this

particular case its prejudicial effect was not cured by the other instructions given."

Appellant wholeheartedly concurs with the statement that each case presents a problem by itself. Appellant cannot too often emphasize that in this case we are dealing with a separate and additional instruction, given a day after the original charge and an instruction which was manifestly the determining factor in the decision of the jury.

Appellant submits that on the authority of the *Bloch* case, the judgment on the verdict in the instant case should be reversed because the language of the additional instruction in this case and circumstances under which the additional instruction was given were far more prejudicial.[4]

**C. The *Murdock* case involved a misdemeanor statute**

The court's additional instruction was undoubtedly inspired by the following language concerning the word "willfully" contained in *United States v. Murdock, supra*:

> "The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose . . . ; without justifiable excuse . . . ; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct

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[4] The recent case of *Banks v. United States* (C.A. 8, 1955) 223 F.(2d) 884, 889, also makes clear that the basis of this court's decision in the *Bloch* case was " . . . on the count covering the subject of willfulness."

> marked by careless disregard whether or not one has the right so to act, . . . " (Citations omitted)

The *Murdock* case involved Sec. 1114(a) of the Revenue Act of 1926 and Sec. 146(a) of the Act of 1928 which were identical and are set forth in the margin.[5]

The defendant in the *Murdock* case had been indicted for refusal to give testimony and supply information as to deductions claimed in his 1927 and 1928 income tax returns for moneys paid to others. It should be carefully noted that the statutes cited proscribed the willful failure to make a return and pay tax in addition to the failure to keep records and supply information.

Sec. 1114(a) of the Revenue Act of 1926 and Sec. 146(a) of the Revenue Act of 1928 are now embodied in 26 U.S.C. 145(a) as follows:

> "Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax

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[5] "Any person required under this Act to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this Act, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution."

> or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution."

It is clear that in the *Murdock* case the Supreme Court construed the predecessor to Sec. 145(a). But in the instant case, appellant was charged in nine counts with violation of Sec. 145(b) which states:

> "Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Sec. 145(a) relates to a misdemeanor; Sec. 145(b) relates to a felony, as is specifically stated therein. And the punishment provisions of the felony statute are accordingly far more severe than those of the misdemeanor statute.

The question then becomes — may the standard of willfulness applicable to Sec. 145(a) and its predecessor be applied to the felony statute, Sec. 145(b)?

**D. The Supreme Court has distinguished between the misdemeanor and felony statutes**

The essence of *Spies v. United States,* 317 U.S. 492, 497-499, was the difference between the felony and misdemeanor statutes; and in the same case the Supreme Court clearly laid down the requirements of willfulness under the felony statute.

Defendant in that case was indicted and convicted under Sec. 145(b). The Government contended that a willful failure to file a return and a willful failure to pay tax, without more, constituted an attempt to defeat or evade under Sec. 145(b). This theory was embodied in the trial court's instructions contrary to the claims of defendant that such proof would only establish two misdemeanors under Sec. 145(a). The Supreme Court, finding the instructions as to the elements of the crime erroneous, reversed the decision of the Court of Appeals which had affirmed the trial court. The discussion by the Supreme Court is lengthy but wholly pertinent to the definition of willfulness under Sec. 145(b) and especially to the issue of whether the word was of equal application in the misdemeanor and felony statutes:

> "Willful failure to pay the tax when due is punishable as a misdemeanor. Section 145 (a). The climax of this variety of sanctions is the serious and inclusive felony defined to consist of willful attempt in any manner to evade or defeat the tax. Section 145(b). The question here is whether there is a distinction between the acts necessary to make out the felony and those which may make out the misdemeanor.
>
> "A felony may, and frequently does, include lesser offenses in combination either with each other

or with the other elements. We think it clear that this felony may include one or several of the other offenses against the revenue laws. But it would be unusual and we would not readily assume that Congress by the felony defined in §145(b) meant no more than the same derelictions it had just defined in §145(a) as a misdemeanor. Such an interpretation becomes even more difficult to accept when we consider this felony as the capstone of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency.

"The difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. *Both must be willful, and willful, as we have said, is a word of many meanings, its construction often being influenced by its context.* United States v. Murdock, 290 U.S. 389, * * *. It may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness. But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been no willful failure to disclose the liability, is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer.

"Had §145 (a) not included willful failure to pay a tax, it would have defined as misdemeanors generally a failure to observe statutory duties to make timely returns, keep records, or supply information—duties imposed to facilitate administration of the Act even if, because of insufficient net income, there were no duty to pay a tax. It would then be a permissible and perhaps an appropriate construction of §145(b) that it made felonies of the same willful omissions when there was the added element of duty to pay a tax. The definition of such nonpayment as a misdemeanor we think argues strongly against such an interpretation.

"The difference between the two offenses, it seems to us, is found in the affirmative action implied from the term 'attempt,' as used in the felony subsection. It is not necessary to involve this subject with the complexities of the common-law 'attempt.' The attempt made criminal by this statute does not consist of conduct that would culminate in a more serious crime but for some impossibility of completion or interruption or frustration. This is an independent crime, complete in its most serious form when the attempt is complete, and nothing is added to its criminality by success or consummation, as would be the case, say, of attempted murder. Although the attempt succeeds in evading tax, there is no criminal offense of that kind, and the prosecution can be only for the attempt. *We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues, Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute*

*the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.*

"Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the congressional provision that it may be accomplished 'in any manner.' By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime." (Emphasis supplied)

At the outset we notice at once the statement of the court that "willful" is a word of many meanings, its construction often being influenced by its context. We must, therefore, consider its context in the *Murdock* case and that context was the misdemeanor statute.

The Supreme Court then goes on to discuss the concept of willfulness under the felony statute. It states that Sec. 145(b) requries "some willful commission in addition to the willful omissions that make up the list

of misdemeanors." What is needed is a "willful and positive attempt to evade tax in any manner, or to defeat it by any means."

The difference is clear. The misdemeanor statute relates to acts of omission; the felony statute relates to positive, affirmative acts of commission. Stubbornness, perverseness, obstinacy, a reckless disregard of whether one has the right so to act may all give rise to willful omissions. They may result in a failure to keep records, supply information, file a return or pay tax.

But stubbornness, perverseness and obstinacy can never be the positive, affirmative acts of commission required by the felony statute; nor can the doing of a thing without ground for believing it to be lawful or conduct marked by a reckless disregard whether or not one has the right so to act. All of these standards lack the vital element of an affirmative act knowingly performed to the end and with the purpose that tax will thereby be evaded or defeated.

In its original instructions, the trial court paraphrased the last quoted paragraph from the *Spies* case.[6] It outlined those willful acts which may constitute attempts to evade under Sec. 145(b). It was therefore,

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[6] "Section 145(b) of the Internal Revenue Code punishes a willful attempt to evade and defeat taxes in any manner and so you may find that conduct such as keeping false books, making false entries in the books, altering invoices or other records, concealment of assets, covering up sources of income, handling one's affairs to avoid the making of usual records and any conduct the likelihood of which would be to mislead or conceal as constituting an attempt to evade and defeat taxes." (R. 2666)

especially erroneous for the trial court, in its additional instruction, to substitute for its previously given correct standard of willfulness, as derived from the *Spies* opinion, the weaker and erroneous *Murdock* instruction derived from the misdemeanor case.

In repeating its original instructions on "willfully," "knowingly," and "specific intent" prior to giving the *Murdock* instruction as an additional instruction, the trial court compounded its error. For it told the jury that the *Murdock* instruction was "in substance, the same matter" as its previous instructions on "willfully," "knowingly" and "specific intent." It was not. It was a lower standard, applicable to a lesser crime. And this was in direct response to the jury's request for "an interpretation of the word willfully as used *in the indictment.*"

In effect, the trial court gave to the jury an *alternate* standard which the jury might employ — a standard lower than it had previously given. The *Murdock* instruction here was not a part of a whole, as it was in *Bateman v. United States, infra; Berkovitz v. United States, infra; Legatos v. United States, infra,* and *Banks v. United States, infra.* It was here presented to the jury as an alternate and separate standard by which they might determine the only real issue in the case. Using that standard, the jury brought in its verdict of guilty as to appellant. There is not in any part of the trial court's additional instruction a remote suggestion of the Supreme Court's unmistakable meaning when in the *Spies* case it describes the meaning of willfulness under Sec. 145(b).[7]

[7] The "admirable clarity and correctness" of the *Spies*

**E. Willfulness under Sec. 145(b) must comprehend a specific wrongful intent to evade a known tax obligation**

The courts have for many years applied plain and straightforward definitions of the meaning of "willfulness" in the crime of tax evasion. Thus, in *Hargrove v. United States* (C.A. 5, 1933) 67 F.(2d) 820, 823, the trial court had erroneously charged that a man may have no intention to violate the law and yet if he willfully and knowingly does a thing which constitutes a violation of the law, he has violated the law. Of this the court said:

> "The court here fell into the error of not distinguishing between the elements of an offense, where the statute simply denounces the doing of an act as criminal, and where it denounces as criminal only its willful doing. In the first class of cases, especially in those offenses mala prohibita, the law imputes the intent. . . . Had the prosecution here been under such a statute, the charge of the court would have been unexceptionable. In the second class of cases, a specific wrongful intent, that is, actual knowledge of the existence of obligation and a wrongful intent to evade it, is of the essence." (Citations omitted)

The meaning and nature of willfullness are again made clear in *United States v. Martell* (C.A. 3, 1952) 199 F.(2d) 670, 672:

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case are approved in *Jones v. United States* (C.A. 5, 1947) 164 F.(2d) 398, and most recently in *United States v. Bardin* (C.A. 7, 1955) 224 F.(2d) 255. It is interesting to note that none of the other cases cited in this section which discuss the correctness of the *Murdock* instruction consider it in the light of the requirements of the *Spies* case.

"Willfulness is an essential element of the crime proscribed by §145(b). It is best defined as a state of mind of the taxpayer wherein he is fully aware of the existence of a tax obligation to the government which he seeks to conceal. A willful evasion of the tax requires an intentional act or omission as compared to an accidental or inadvertent one. It also requires a specific wrongful intent to conceal an obligation known to exist, as compared to a genuine misunderstanding of what the law requires or a bona fide belief that certain receipts are not taxable. A conviction cannot be sustained unless this state of mind is supported by the evidence and explained to the jury."

Another example of a correct instruction is found in *Haigler v. United States* (C.A. 10, 1949) 172 F.(2d) 986, 989, as follows:

"The jury was instructed that willful intent was an essential element of the proof of the crime charged, and that in order to justify a verdict of guilty, it was necessary to prove, not only that a false return had been filed, but that the appellant caused the return to be made with knowledge that it was fraudulent, and with the willful intention of evading his obligation under the statute."

The portion of the charge on willfulness in *Gaunt v. United States* (C.A. 1, 1950) 184 F.(2d) 284, 291, is set forth in the margin.[8] Here willfully was defined di-

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[8] "'Willfully' means knowingly, and with a bad heart and a bad intent; it means having the purpose to cheat or defraud or do a wrong in connection with a tax matter. It is not enough if all that is shown is that the defendant was stubborn or stupid, careless, negligent or grossly negligent. A defendant is not willfully evading a tax if he is careless about keeping his books. He is

rectly within the framework of a "purpose to cheat or defraud or do a wrong in connection with a tax matter." And the jury was instructed that it is not enough that the defendant be stubborn or stupid or even grossly negligent. Compare this with the trial court's additional instruction that willfully may mean to act stubbornly, obstinately, perversely or conduct marked by a reckless disregard of whether or not the defendant had the right so to act. The very protections accorded in the *Gaunt* instruction are those which are destroyed by the instruction under question.

The applicable portion of the charge in the recent case of *Gariepy v. United States* (C.A. 6, 1955) 220 F. (2d) 252, 260-261[9] makes it unmistakably clear that the

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not willfully evading a tax if all that is shown is that he made errors of law. He is not willfully evading a tax if all that is shown is that he in good faith acted contrary to the regulations laid down by the Bureau of Internal Revenue and the United States Department of the Treasury. He certainly is not willful if he acts without the advice of a lawyer or accountant, for there is no requirement that a taxpayer, no matter how large his income, should engage a lawyer or an accountant."

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[9] " . . . but you cannot find the defendant Gariepy guilty unless you find beyond a reasonable doubt that he had knowledge that he received more money than that reported and willfully attempted to defeat and evade the tax imposed thereon in the manner charged in the indictment . . . It must be proved that the defendant acted not only knowingly, as I said above, but that he he has acted willfully in an attempt to evade and defeat a particular tax charged or a portion of it. . . . Willfulness is an essential element of the crime charged. Willfulness is the state of mind of the defendant where he is fully aware of the existence of a tax imposed upon him by the law which he seeks to

element of willfulness is directly and intimately related to and in fact consists of the state of mind of the defendant when he is fully aware of the tax obligation and wrongfully seeks to evade or defeat it.

Each of these cases makes it clear that the essence of willfulness under Sec. 145(b) may be clearly and simply stated. It is the specific wrongful intent to defeat or evade a known tax obligation. This is the specific element which the trial court completely omitted to mention in its *additional* instruction to the jury. The additional instruction is couched throughout in general language which never once speaks of the knowledge of tax obligations and the specific intent to evade them. And the final criterion given to the jury in response to its direct request was the standard declared erroneous in the *Bloch* case.

**F. The instant case may be distinguished upon the instruction given from all other cases in which a similar instruction on willfulness was given**

Convictions have been affirmed in cases in which the instruction on willfulness appears deceptively similar to the additional instruction in the instant case. In no event should it be forgotten that the additional instruction in the instant case was given separately at the

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evade or defeat. Willful evasion requires an intentional act or omission as compared to an accidental or inadvertent. It requires a specific wrongful intent to defeat or evade the tax obligation known to exist. . . . There can be no crime without a criminal intent, as the court has just now instructed you, and in this case, the specific intent is necessary to constitute the crime under the charge made in the indictment."

specific request of the jury a day after the initial charge.

But it is appellant's purpose to point out clearly and fully that in none of the cases of affirmance was the situation comparable to our own, and that the charge in those cases contained safeguards wholly lacking in the case here under determination.

We must also keep in mind that certain cases have dealt with the issue of presumption of guilt and the instruction appropriate thereto. The *Bloch* cases was such a case; but error was predicated independently on the willfulness instruction. In this case, appellant directs the court's attention wholly to the issue of willfulness.

Much has been made, in the subsequent discussion of the *Bloch* case, of the case of *Bateman v. United States* (C.A. 9, 1954) 212 F.(2d) 61, 70. For that reason, the instruction of the court on willfulness as shown by the reported decision is set forth in the margin.[10]

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[10] "In order to secure conviction, it is necessary to prove that the conduct of the defendants was willful. The mere fact that the tax returns in question were made by another, is no defense. If, on the other hand, you believe that the defendants Wallace Bateman and Charles Bateman did not act willfully, but mistakenly, and errors, if any, were caused by the tax consultant or other person preparing the returns and there was no willful intent on the part of Wallace Bateman or Charles Bateman to evade taxes, but that their signing of the returns resulted from inadvertence and mistake, then it is your duty to acquit the defendants or either of them. . . .

"However, even gross carelessness, recklessness or negligence in the preparation of an income tax return or honest errors of fact or of law, is not fraud, and

The following is a further portion of the charge relating to willfulness:

> "You will observe that one of the elements of the offense as charged is that the defendants willfully attempted to evade or defeat payment of their just tax. Willful attempt means an intentional one, done with bad purpose or evil motive, and it is therefore necessary that the Government prove that in filing their income tax returns, the defendants thereby, with such purpose or motive, intended to evade or defeat the payment of some portion of their income tax."

The charge as reported does not include all of the equivocal elements of the *Murdock* instruction. All of the portions of the charge in the *Bateman* case here

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before the jury can infer the existence of fraud in this case, they must find beyond a reasonable doubt from the evidence that either or both of the defendants willfully, with intent to evade their Federal income taxes, prepared or caused to be prepared a materially false income tax return reporting income of the defendants covering either or both of the tax years 1945 or 1946. . . .

"If you find from the evidence that these defendants sought advice and counsel with respect to their income tax liability for the years 1945 and 1946 from one whom they thought would properly and correctly prepare their income tax returns, and if you further find that the defendants honestly attempted to provide their tax consultant and advisor with all information reasonably necessary to enable the consultant to prepare correct income tax returns, and that the taxpayers when they signed the same, presumed they were true and correct, then your verdict should be not guilty, for there would be absent the element of knowing and willful intent to evade or to attempt to evade payment of income taxes, even though it now develops that said income tax returns were materially wrong."

cited specifically relate the element of willfulness to the crime charged and not to any general proposition of criminal law. Again and again it is made plain in the charge that the willfulness is related to an intent to evade or defeat the payment of income tax. There is no talk of stubbornness, obstinacy or perversity; and the instruction makes it clear that "even gross carelessness, recklessness or negligence in the preparation or relating to the preparation of an income tax return" does not constitute the crime of tax fraud—contrary to the additional instruction in the instant case.

Like the *Bateman* case, *Berkovitz v. United States* (C.A. 5, 1954) 213 F.(2d) 468, 473, concerned itself mostly with the question of the presumption of guilt arising from the filing of a false or incorrect return. The charge contained language somewhat similar to that contained in the trial court's additional instruction.[11] It will be noted that the similar language in the

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[11] "Now the word 'wilfully' in the sense used here, denotes often, intentional, knowing, or voluntary, as distinguished from an accidental act, and also employed to characterize the thing done without grounds for believing it lawful or conduct marked by careless disregard of whether one has the right so to act, but, when used in a criminal statute, gentlemen, generally means an act done with bad purpose, without justifiable excuse, stubbornly, obstinately, or perversely.

* * * * * * * *

"The attempt to defeat and evade the tax must be a wilfull attempt, that is to say, it must be made with the intent to keep from the government a tax imposed by the income tax laws which it was the duty of the defendant to pay to the government. The attempt must be wilfull, that is, intentionally done, with the intent that the government should be defrauded of the income tax due from the defendant."

*Berkovitz* case was followed by an unmistakably clear instruction that the element of willfulness is inextricably intertwined with the specific intent to evade a known tax obligation.

We may now consider the most recent decision of this court upon this problem. *Legatos v. United States* (C.A. 9, 1955) 222 F.(2d) 678, 687, 688. Here, once more, the question of willfulness is allied to the question of presumption of guilt; and the basic contention upon this appeal was that there was an erroneous instruction on the matter of presumption in the light of *Morissette v. United States,* 342 U.S. 246, and *Wardlaw v. United States* (C.A. 5, 1953) 203 F.(2d) 884. Since, however, the instructions included a definition of willfulness similar to the additional instruction in this case, it is necessary to consider the whole portion of the charge relating to intent, knowledge and willfulness.[12]

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[12] "Intent is an essential element in the perpetration of the offenses charged against the defendants in the indictment. Intent may be shown by proof of facts and circumstances from which it may be reasonably and satisfactorily inferred. In determining whether a defendant had such intent, you should take into consideration all the facts and circumstances in evidence, the acts and conduct of such defendant, and his motives, if any, disclosed by the testimony, for doing or not doing the act or acts charged in the indictment as shown by the evidence; and if from all the facts and circumstances in the evidence there is no other reasonable conclusion than that he is guilty, you should so find.

"One of the essential elements of the proof of attempt to evade income tax or the payment thereof is knowledge on the part of the taxpayer of the existence of the obligation; that is, of the tax due and a specific wrongful intent to evade the payment thereof. If you

The difference must now be clear. The *Murdock* language used in the *Legatos* case was not given as an isolated instruction, much less as the philosopher's stone by which the jury might determine the ultimate issue

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find from all the evidence that the defendant Legatos did not have actual knowledge of the existence of an obligation on his part to pay any income tax in addition to the income tax reported by him in his original income tax returns, and that said defendant did not have a specific wrongful intent to evade such obligation, then you should find the defendant Legatos not guilty.

"Fraud is an actual intentional wrongdoing and the intent required is a specific mental determination or purpose to evade a tax known or believed to be owing. Before you can convict the defendant Legatos, you must find from the evidence beyond a reasonable doubt that any income tax return involved in this indictment was not only false and fraudulent, but that by such false and fraudulent return said defendant committed an actual, intentional wrong-doing and that the filing of said return was with the intent on his part to evade a tax owing or believed to be owing to the United States.

"The word 'wilfull' when used in a criminal statute, generally means an act done with a bad purpose, but the word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by disregard whether one has the right so to act.

"The word 'wilfully,' as used in this statute, means more then [sic] intentionally or voluntarily, and includes an evil motive or bad purpose, so that evidence of an actual bona fide misconception of the law, such as would negative knowledge of the existence of the obligation would, if believed by the jury, justify a verdict for a defendant. It is for the jury to say whether a defendant had the requisite criminal intent that is whether he willfully and knowingly attempted to defeat and evade the income tax."

which plagued them. The *Murdock* language there is sandwiched between all manner of protective language, making it clear at all times that the willfulness involved is the willful evasion of a known tax obligation. Thus, the charge by way of introduction to this concept says:

> "One of the essential elements of the proof of attempt to evade income tax or the payment thereof is knowledge on the part of the taxpayer of the existence of the obligation; that is, of the tax due and a specific wrongful attempt to evade the payment thereof."

Again the court reverts to the theme that it must be shown that the income tax return involved was not only false and fraudulent, but that by the false and fraudulent return the defendant committed an actual and intentional wrongdoing, and that the filing of the return was with the intent on his part to evade a tax owing or believed to be owing to the United States. Then comes the language of the *Murdock* instruction which in this case is auxiliary to what has been said before and to what is said after—that the jury must ultimately determinte whether Legatos willfully and knowingly attempted to defeat and evade a known tax obligation.

The *Legatos* case must be read in the light of the warning contained in this court's decision on the petition for rehearing in the *Bloch* case — that each case presents a problem by itself. Appellant submits that regardless of the use of the *Murdock* language in the *Legatos* case, the jury was there fully and clearly instructed on the issue of willfulness.

The most recent case[13] involving the *Murdock* in-

[13] In *Herzog v. United States* (C.A. 9, 1955) 226 F.(2d)

struction is *Banks v. United States* (C.A. 8, 1955) 223 F.(2d) 884, 889. While the *Murdock* language was there used, the court makes it plain that the specific application of this language was not omitted, for the court there charged the jury:

> "The element of intent enters into the effenses charged in the indictment and is one of the questions for you to consider and decide. That is, whether the defendant willfully and knowingly attempted to defeat and evade a portion of his income tax due and owing by him to the United States of America for the calendar years 1945, 1946 and 1947."

**G. The giving of the *Murdock* instruction as a separate instruction at the special request of the jury created incurable error**

Appellant has already urged that the language of the *Murdock* instruction is erroneous when applied to Sec. 145(b), and that in any event this case should be decided on the authority of the *Bloch* case. A review of the other cases in which a similar problem has arisen shows that in each of those cases the jury were fully and adequately instructed on the subject of willfulness.

But even if error in the use of the *Murdock* instruc-

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561, decided October 11, 1955, this court did not consider the merits of the *Murdock* instruction, or to use this court's own words "whether the instruction is slightly tainted with error or seriously tainted." Taint is conceded. The *Herzog* holding overrules the procedural aspect only of the *Bloch* case; it holds that the appellate court may not notice error in instructions under Federal Rule of Criminal Procedure 52(b) where Federal Rule of Criminal Procedure 30 has not been observed.

tion may be cured by considering all of the instructions in context and determining whether on the whole the jury were fully informed as to the meaning and necessity of willfulness in the felony of tax evasion, such a rule cannot be applied to this case where the erroneous instruction was given in response to the special request of the jury.

Such is the holding in *Bollenbach v. United States,* 326 U.S. 607, 611-612, 613, 615.

There the trial had lasted seven days and the jury, having deliberated for seven hours, returned to the court for an additional instruction. The additional instruction proved to be erroneous.

The Supreme Court reversed the affirmance by the Court of Appeals of the trial court's judgment of guilty upon the verdict. The court laid special emphasis upon the jury's request for an additional instruction:

> "But precisely because it was a last-minute instruction the duty of special care was indicated in replying to a written request for further light on a vital issue by a jury whose foreman reported they were 'hopelessly deadlocked' after they had been out seven hours. 'In a trial by jury in a Federal Court, the Judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.' Quercia v. United States, 289 U.S. 466, 469. * * * 'The influence of the trial judge on the jury is necessarily and properly of great weight,' Starr v. United States, 153 U.S. 614, * * * and jurors are ever watchful of the words that fall from him. *Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific*

*ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge.*" (Emphasis supplied.)

The court went on to emphasize again the responsibility of the trial court in this special situation:

"Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties a trial judge should clear them away *with concrete accuracy.*" (Emphasis supplied.)

It is under this holding that the erroneous effect of the additional instruction becomes plain. Faced with the special request of the jury for further enlightenment upon the single vital issue of the case, the judge was under a duty to reply "with concrete accuracy." The trial court's additional instruction was not simply "misleading." It was "plain error" and so this court held upon both hearings of the *Bloch* case.[14]

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[14]The *Bollenbach* case has subsequently met with widespread judicial approval. For the proposition that "a conviction ought not to rest upon an equivocal direction to the jury on a basic issue," see *M. Kraus & Bros. v. United States,* 327 U.S. 614; and the concurring opinion of Mr. Justice Frankfurter in *Estep v. United States,* 327 U.S. 114. See also, for the same proposition and citing and approving the *Bollenbach* decision the following: *McFarland v. United States* (C.A.D.C. 1949) 174 F.(2d) 538; *United States v. Levi* (C.A. 7, 1949) 177 F.(2d) 827; *United States v. Donnelly* (C.A. 7, 1950) 179 F.(2d) 227; *Kitchen v. United States* (C.A.D.C., 1953) 205 F.(2d) 720; *Hamilton v. United States* (C.A. 5, 1955) 221 F.(2d) 611. Although convictions were reversed in these cases

**H. Summary**

To summarize his contentions, appellant submits that the *Murdock* instruction is derived from a misdemeanor case; that the *Spies* case has made it clear that the standard of willfulness in a misdemeanor case may not be applied to a felony case. Appellant further submits that the language of the *Murdock* case has twice been found to be erroneous by this court in the *Bloch* case.

While the use of the *Murdock* language may be non-prejudicial as a part of a charge which as a whole correctly sets forth the elements of willfulness under Sec. 145(b), such circumstances are not before the court in this case. Here the erroneous instruction was given separately, one day after the initial charge as an alternate and separate standard, and in response to the specific request of the jury for a further definition of the word "willfully."

Under the circumstances, it was the duty of the trial judge to be "concretely correct" since, as Mr. Justice Frankfurter observed in the *Bollenbach* case, the jury were bound to be most impressed by the judge's last words of instruction. The trial judge was not "concretely correct." He gave an additional instruction which this court has found erroneous and on that basis the jury brought in its verdict of guilty as to appellant.

Upon the authority of the *Bollenbach* case, the trial

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because of equivocal instructions upon basic issues, in none of them was there involved an *additional* instruction to the jury which proved to be erroneous as in the *Bollenbach* case and the instant case. It should be noted that the *Bollenbach* holding was specifically approved by this court on the rehearing of the *Bloch* case.

court's error was unquestionably prejudicial. As Mr. Justice Frankfurter stated in the court's opinion:

> "From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing into presuming all errors to be 'harmless'" if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

## II. The Trial Court Erroneously Excluded Appellant's Offered Rebuttal Testimony

### A. The significance of the rebuttal testimony

In this lengthy trial which commenced on January 31, 1954, and concluded on May 14, 1954, each of the three defendants presented his separate case. Appellant's defense was the first defense case heard. Appellant admitted the existence of large tax liabilities, denied any intent to evade taxes and asserted that since all matters of accounting were under the supervision of the defendant Taylor, who prepared all of the tax returns in question, the responsibility for error lay with Taylor. It is important to note that the defense of appellant was not necessarily predicated upon any criminal intent or action on the part of Taylor; it also went to show Taylor's incompetence, want of skill and

knowledge and negligence as the chief factors in the development of the serious understatements of tax.[15]

It was in the nature of things that the defendant Taylor's case, which came after that of appellant, gave Taylor the opportunity not only to submit his own case, but also to rebut the testimony given by witnesses for appellant. The case of the defendant Erickson was presented last. In his own case, therefore, Taylor was able to attempt to explain many vital transactions according to his own light and in contradiction to the explanations submitted by appellant. Thus, it became vitally necessary for appellant to have the opportunity properly to rebut Taylor's testimony. This phase of the appeal deals with the trial court's rejection of appellant's offered rebuttal testimony. Appellant will herein review in detail the offered testimony and show its connection with the principal issues involved in this case—matters of vital importance on issues which can in no way be denominated as collateral, although this was the trial court's basis for exclusion.

The offered rebuttal testimony went to the following issues:

(1) Was it proper for Taylor to submit to different persons financial statements for the same enterprise as of the same date which differed in material particulars, as Taylor admittedly did? Taylor testified that this was a proper and accepted practice. Appellant's offer of rebuttal testimony that it was not went directly to the skill, competence and honesty of Taylor, all of

[15]Almost the whole of the testimony of the appellant's witness Gorans, a certified public accountant, went to this point (R. 422-829).

which were matters essential both to the prosecution and to the defense case of appellant.

(2) What is the meaning of "cash on hand and in banks" in a financial statement? Taylor testified that this could include accounts receivable. The offered rebuttal testimony, as will be shown, went directly to the issue of Taylor's knowledge of appellant's affairs. Appellant's defense was that Taylor had full knowledge and full responsibility; Taylor's defense was that he had limited knowledge and limited responsibility.

(3) Did the defendant Taylor in a conference with a bank officer admit to knowledge of certain bank accounts of appellant and their amounts? Appellant offered rebuttal testimony to show such knowledge, going to the heart of the contentions already set forth.

(4) Did the witness Egenes make certain alterations in the books of Finstad & Utgard? Taylor testified in his case that he did. Appellant offered the testimony of Egenes in rebuttal. Alterations in the books of the appellant's various enterprises were a key issue in this case, going directly to the responsibility of the various defendants.

(5) What was the proper amount of bonus payments to milk shippers at Finstad & Utgard for the year 1947? Taylor testified that the alteration by Egenes of the Finstad & Utgard books arose out of bonus payments in an amount equal to the alteration. Appellant offered the rebuttal testimony of Egenes to show that the actual bonus payments during that year were less than 25% of the alteration. This testimony went directly to the proof of Taylor's responsibility for the alterations. It involved not only Taylor's skill as an accountant, but his character.

These are issues upon which appellant's proposed rebuttal testimony was rejected by the trial court.

**B. Appellant was entitled to rebut the case propounded by the defendant Taylor**

The prosecution case generally went to show the facts which had resulted in tax understatements. The defendants presented different versions as to the responsibility for these facts. When Taylor's explanation conflicted directly with that of appellant, appellant was entitled to rebut the Taylor case even though these matters may not have gone directly to rebut the prosecution case.

The principle is made clear by Wigmore. He states in Wigmore on Evidence, 3rd Ed., §916(3):

> "Where a *co-defendant in a criminal prosecution* testifies for himself, the other co-defendant may impeach him, because their interests, as between each other, are distinct, and because the witness has been called by himself and not by the impeacher; and the same consequence follows for witnesses called by one co-defendant." (Italics the author's.)

The impeachment may consist of cross-examination[16] or contradiction. The trial judge correctly permitted counsel for each defendant to cross-examine the other defendants and their witnesses. In a like manner, each defendant was correctly permitted to offer testimony in rebuttal of the case of the other defendants. The question before the court is limited to the proper scope of that rebuttal testimony.

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[16]See Wigmore on Evidence, 3rd Ed. §916 (5).

**C. Material matters elicited on cross-examination may always be rebutted**

The trial court's exclusion of appellant's offered rebuttal testimony was based upon the theory that it related to collateral matters elicited on cross-examination and was therefore not properly rebuttable. The question is not so much of law as of the application of the law to the specific facts of this case.

The basic rule is laid down by Wigmore that the testimony of a witness may not be contradicted on collateral matters. Wigmore on Evidence, 3rd Ed., §1001. He realizes that the difficulty lies in the definition of the word "collateral" which is "a mere epithet, not a legal test."[17] He therefore adopts the rule laid down in *Attorney General v. Hitchcock,* 1 Exch. 104, as follows:

> "Could the fact, as to which error is predicated, have been shown in evidence for any purpose independently of the contradiction?"

The adoption of this test leads to the conclusion that there are two classes of facts of which evidence would have been admissible independently of the contradiction: (1) facts relevant to some issue of the case, and (2) facts relevant to the discrediting of the witness with respect to some specific testimonial quality such as bias, corruption, skill, knowledge or the like.[18]

The rule of *Attorney General v. Hitchcock, supra,* has been specifically adopted by this court. *Nye & Nissen v. United States* (C.A. 9, 1948) 168 F.(2d) 846, aff'd 336 U .S. 613. And more recently, in *Shanahan v.*

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[17]Wigmore, op. cit. §1003.

[18]Wigmore, op. cit. §1004, §1005.

*Southern Pacific Co.* (C.A. 9, 1951) 188 F.(2d) 564, this court has approved of the Wigmore analysis.

*Nye & Nissen v. United States, supra,* cites and approves the opinion in *Ewing v. United States* (C.A.D.C., 1942) 135 F.(2d) 633, in which the whole matter of contradiction by rebuttal testimony is exhaustively discussed. This case also adopts the rule of *Attorney General v. Hitchcock, supra,* and holds that rebuttal testimony is admissible to contradict matters brought out on cross-examination if the rebuttal testimony directly relates to material issues of the case or to the testimonial qualifications of the cross-examined witness.

*Ewing* was a case of rape wherein a witness for the defendant was cross-examined as to statements in which she had allegedly conceded the guilt of the defendant. She denied having made such admissions. Her testimony was that she had been in the presence of the prosecutrix during the entire time in which the alleged attack took place and that it did not take place. The prosecution was permitted to rebut the denial of the defense witness that she had conceded defendant's guilt. The defense claimed that the cross-examination in question had been on a collateral matter. The court held that the matter elicited on cross-examination and the rebuttal thereof would go not only to the crucial issue in the case, but also the bias and credibility of the witness.[19]

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[19]See also *United States v. Pincourt* (C.A. 3, 1946) 159 F.(2d) 917, where testimony elicited on the cross-examination of defendant was rebutted by a Government witness and the Circuit Court found that the record justified the district judge's characterization

Our inquiry, therefore, is to determine whether the testimony offered by appellant and rejected was independently admissible—whether it was relevant to some issue in the case or whether it was relevant to the testimonial qualifications of the cross-examined witness, the defendant Taylor.

**D. Analysis of the rebuttal testimony which was offered and rejected**

**(1) *The testimony of Phillip A. Strack***

Mr. Strack was an officer of the Peoples National Bank of Washington with whom the appellant and Taylor had extensive dealings. He was offered as a rebuttal witness. The court sustained objections to the following two questions as improper rebuttal:

> (1) "Mr. Strack, as a bank officer will you accept and rely on a financial statement submitted by a borrower if you knew that the borrower had outstanding for the same date a different statement?" (R. 2398)
>
> (2) "Now, Mr. Strack, will you state on a financial statement what is meant by 'cash'?" (R. 2399-2400)

These questions arose out of testimony elicited on the cross-examination by appellant's counsel of the defendant Taylor. On this cross-examination there were admitted defendant's Exhibit A-92 a financial state-

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of the particular issue as "important." See also *United States v. Stoehr* (U.S. D.C., Pa., 1951) 100 F. Supp. 143, aff'd (C.A. 3, 1952) 196 F.(2d) 276, a tax case where the general rule is again laid down that testimony elicited on cross-examination with respect to a *collateral* matter may not be impeached.

ment of Issaquah Creamery Company (hereinafter called "Issaquah") for December 31, 1933, and defendant's Exhibit A-93, a financial statement of Issaquah for December 31, 1934, containing a comparative statement showing the state of the company's affairs on January 1, 1934, and December 31, 1934.

A comparison of the balance sheets for December 31, 1933, on A-92 and for January 1, 1934, on A-93 showed accounts receivable to be $20,444 on A-92 and $18,360.96 on A-93 (R. 1932-1933), accounts payable to be $25,-278.32 on A-92 and $9,546.55 on A-93 (R. 1940).

Defendant's Exhibit A-95 was a financial statement of Issaquah for December 31, 1935, containing a summary of operations for previous years. A-92 showed a profit for 1933 of $2,019.40. A-95 showed a profit for the same year of $12,697.27 (R. 1955). Both exhibits were prepared by Taylor and A-95 was submitted to The First National Bank of Stanwood (R. 1954).

The operations for the year 1934 resulted in a loss of $1.73 as shown by A-93. However, A-95, the statement given to The First National Bank of Stanwood, showed a profit for that year of $11,469.30 (R. 1956).

A-65 was a financial statement for Issaquah prepared by Taylor bearing the date December 31, 1935, exactly the same date as A-95. Taylor testified that this statement was delivered to The Peoples National Bank of Washington (R. 1957). Let us now compare various items as contained in these two statements for the same company for the same date delivered to two different banks:

| Item | A-95 | A-65 |
|---|---|---|
| Sales | $480,472.26 | $477,961.54 |
| Cash on Hand | minus 6,213.74 | 2,187.03 |
| Profit or Loss | 13,732.75 | minus 1,369.37 |

(R. 1959-1961)

Defendant's Exhibit A-99 was a financial statement dated December 31, 1938, for Issaquah. Taylor testified that this statement was delivered to appellant (R. 1977). Defendant's Exhibit A-100 was a financial statement for Issaquah for the same date which Taylor testified he believed was delivered to the Issaquah State Bank (R. 1980). A summary of certain comparative items is shown in the margain.[20]

Thus, on the statement delivered to the Bank, A-100, Taylor increased the items for cash on hand, notes receivable, accounts receivable, inventory and equipment. He decreased items for milk accounts payable, notes payable and accounts payable. In the end, he arrived at a surplus shown on A-99 of $42,517.23 and on a A-100, the statement given to the Bank, of $64,695.02.

The net result of these statements is to make it clear

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| | A-99 | A-100 |
|---|---|---|
| [20]Cash on hand | $ 2,406.42 | $ 4,797.66 |
| Notes receivable | 3,444.94 | 3,847.89 |
| Accounts receivable | 46,650.55 | 56,660.68 |
| Inventory | 15,169.43 | 16,891.83 |
| Equipment | 75,375.17 | 88,394.12 |
| Milk account liability | 11,188.17 | 9,616.53 |
| Notes payable | 12,729.29 | 4,825.90 |
| Accounts payable | 18,862.35 | 7,853.20 |
| Surplus | 42,517.23 | 64,695.03 |

(R. 1979-1990)

that Taylor on various occasions gave statements to different parties covering the same enterprise as of the same date and displaying radically different figures. In the case of Exhibits A-95 and A-65, two banks received two completely different statements. In the case of A-99 and A-100, the Issaquah State Bank received a statement differing materially from that delivered by Taylor to appellant.

By this line of cross-examination appellant sought to show that Taylor was a practiced manipulator of financial statements. It nowhere appeared from the testimony that the appellant was familiar with these statements, that he was aware of the differences between the statements or that he in any way participated in the composition of them. This cross-examination went directly to Taylor's want of skill and competence as an accountant, which was the substance of appellant's defense. This cross-examination tended to show that the question was as much of Taylor's accounting ethics as of his professional skill.

How did Taylor explain these extraordinary variations? The substance of his testimony was that different people want to see different things in a financial statement, that he was within the bounds of good accounting procedure in making up all of the questioned statements. As to the loss of $1.73 shown in A-93 (which had never been submitted to a bank) and which had been converted into a tidy profit of $11,469.30 in A-95 which was delivered to the First National Bank of Stanwood, Taylor gave the ingenuous explanation that:

> "Mr. Forster was in a very difficult position financially. The bankers wanted to work with him.

The bank examiners would not accept minus figures." (R. 1958)

Taylor's conception of fundamental accounting practice is illustrated by another statement made with regard to the differences between A-65, the statement delivered to the Peoples National Bank and A-95, the statement delivered to the First National Bank of Stanwood. Of those he stated:

"Mr. Griffin, when any balance sheet balances your figures are never incorrect in that balance sheet. You may adjust them, suitable figures to suit certain occasions—." (R. 1960)

The matter is made even more clear by Taylor's further explanation:

"They were two distinct statements for a purpose." (R. 1961)

"Q. Was one purpose to be able to show that Isaaquah Creamery Company was operating at a loss for the purpose of borrowing money?

A. We were not borrowing money at the Peoples Bank.

Q. Mr. Taylor, which of those statements before you, that statement of the Peoples Bank or to the Stanwood Bank is correct?

A. They are both correct for the purpose in which they were prepared." (R. 1961-1962)

Appellant's counsel then put the following question to Taylor:

"Q. Do I understand then that you, having put out two statements of December 31, 1935, neither of which agrees with each other as to profit or loss, is it your theory that you could put out ten state-

ments; as long as each one balanced separately they are all right?

A. You can—if you alter figures or make an amended balance sheet for a purpose and it is thoroughly explained nobody is harmed by it." (R. 1962-1963)

Mr. Taylor then explained at length that bankers might want a different valuation placed on assets than that contained in an ordinary financial statement. They would be interested in market values rather than book values (R. 1970-1971). Mr. Taylor insisted that a financial statement given for credit purposes might legitimately vary from a regular financial statement (R. 1982-1983).

It was in the light of this foundation laid upon cross-examination that Mr. Strack was asked on rebuttal if he would accept a financial statement from a borrower if he knew that as of the same date an entirely different financial statement was outstanding. The jury were not experts in matters of accounting. At the time this question was posed to Mr. Strack, the last word on accounting practice had been spoken by Taylor. He had testified at length that different financial statements may be issued for different purposes; that a statement given for credit purposes may be different from other financial statements; that he was justified in composing financial statements which were at variance with each other.

The testimony of the witness Strack was offered to rebut Mr. Taylor's rather informal view of accounting procedure. In accordance with the rule laid down by Wigmore, this rebuttal testimony qualified on two

grounds: it went directly to one of the issues in the case —the skill or lack of skill of Taylor as an accountant (for the want of such skill was a substantial part of appellant's defense); and it went to the testimonial qualification of Taylor, that is to say, not only his skill but also his ethics and character. The offered testimony tended to prove appellant's defense that Taylor failed in his responsibility as an accountant and at the same time it tended to assault the whole foundation of Taylor's credibility as a witness. Surely, these were not collateral matters.

The second question put to Mr. Strack went to the issue of the meaning of cash on hand. Exhibit 252 was a financial statement of appellant dated February 28, 1948, prepared by Taylor. It showed cash on hand and in banks of $293,848.11. The statement was especially prepared for The Peoples National Bank (R. 2285-2286).

We now come to one of the vital maters in the case. Taylor testified that at the date of this statement appellant had in cash the actual sum of only $93,848.11 (R. 2286) as shown by the books of Alpine Dairy, a sole proprietorship, and that appellant's corporate interests were included on a net worth basis. Yet Exhibit 252 showed cash on hand in the sum of $293,848.11. Both counsel for the government and counsel for appellant sought to bring out by cross-examination that the additional sum of $200,000 represented *personal* cash of appellant of which Taylor must have had full knowledge. Whether Taylor had knowledge of Forster's personal holdings and particularly of Account No. 198 in the Washington State Bank at Issaquah, was a matter ab-

solutely fundamental to the responsibility of Taylor in making out tax returns, since a large number of unreported items had passed through Account No. 198. Taylor denied such knowledge.

Counsel for the government sought to show that as of the same date of Exhibit 252, appellant had in cash in Account No. 198, $118,496.32, in the Peoples National Bank $60,687.68, and that Alpine Ice Cream Company (which was at that time a sole proprietorship) had in its account in Peoples National Bank $19,956.91 (R. 2298-2302). These items totalled $199,141.91, or only slightly less than the $200,000.00 adjustment to which Taylor testified in explanation.

How did Taylor seek to explain the fact that his statement, Exhibit 252, showed $200,000.00 more cash than any of the ledgers displayed? His explanation on cross-examination by counsel for the government (R. 2286-2306) was that he had converted $100,000.00 of accounts receivable of Alpine Dairy into cash and that he had converted $100,000.00 of accounts receivable of other Forster enterprises into cash. The matter is summarized by Taylor's testimony as follows:

> "So, we moved that into the cash position for anticipation. We reduced the accounts receivable by $100—$100,000—to show that they had been moved into an anticipation position.
>
> "We then took the statements of the various enterprises, analyzed their cash position, accounts receivable—to determine how much cash could be immediately recovered. We anticipated $100,000.00 could be moved up into the cash position." (R. 2288)

The transaction was again summarized by Taylor under questioning by government counsel as follows:

"Q. And you reached the figure $293,000 by your estimate of quick liquidation of accounts receivable of Alpine Dairy for $100,000 which reduced Alpine's account $100,000 and moved $100,000 into cash, is that it?

A. Yes, that is correct.

Q. And you calculated what your estimate would be of the cash you could raise similarly in the other companies in which Mr. Forster had an interest, and reached another $100,000?

A. Yes.

Q. And the net result showed a figure of $293,000 cash for financial statement you submitted to the bank in February, 1948?

A. That is correct." (R. 2294)

To summarize, we have Mr. Taylor's testimony in support of his own showing of $293,848.11 cash in Exhibit 252 that he had added to the balance in Alpine Dairy, the sole proprietorship, some $200,000 of accounts receivable and denominated them as cash on hand and in banks.

Now we can see the crucial importance of the question put to Mr. Strack. Are accounts receivable and cash interchangeable and indeed synonymous? Again, the last accounting authority heard from on this question was Mr. Taylor. Mr. Strack was not permitted as a banker and as an expert to contradict the testimony of Taylor.

The danger of excluding this offered testimony becomes apparent when we consider the closing argument

made by counsel for Taylor. He reviewed the various manipulations made by Taylor in producing accounting statements and he said:

> "The Government puts out a booklet showing depreciation rates, but the bank is not interested in book figures. The bank is interested in market values. What would those assets bring if they had to sell them at a foreclosure sale?
>
> "And so, as Mr. Taylor told you on the stand, the depreciation in market value was changed to an appraised value, actual appraised value of the assets.
>
> "Now, every other figure, Ladies and Gentlemen, on these statements is exactly the same. These adjustments that are here made as Mr. Taylor told you on the stand, a collection of various changes which present a true picture for credit purposes on the one hand, against the book figures, which are a true picture for tax purposes on the other hand." (R. 2603)

Counsel for Taylor took advantage of the court's exclusion of the offered rebuttal testimony of the witness Strack to tell the jury that Taylor's views of accounting stood uncontradicted. There had been no testimony denying that Taylor's accounting practices were ethical or correct and it was on this basis that counsel for Taylor carried his argument to the jury.

**(2)** ***The testimony of Frank B. Donaldson***

Frank B. Donaldson was vice-president and trust officer of The Peoples National Bank (R. 2678). He was offered as a rebuttal witness and asked the following question:

> "Mr. Donaldson, I will show you plaintiff's Ex-

hibit 123, a financial statement of Hans Forster dated February 29, 1948, in which the entry for cash on hand and in banks is listed as $293,848.11. Will you state, as a banker, what the significance is to you of the entry 'cash on hand and in the banks'?" R. 2401-2402)

The objection to this question as improper rebuttal was sustained (R. 2402).

Again, Taylor's interpretation of the meaning of "cash on hand and in the banks," an interpretation which allowed him to disclaim knowledge of substantial personal assets of appellant, stood unchallenged and uncontradicted. And yet that knowledge was from the point of view of appellant one of the principal issues in this case.

**(3)** ***The testimony of Quentin H. Ellis***

On cross-examination and recross-examination of Taylor by appellant's counsel, the knowledge on the part of Taylor of personal bank accounts of appellant was a vital issue. The following took place on recross-examination:

"Q. I will ask you if on May 5, 1948, at the Peoples National Bank in your explanation of the assets shown on the statement of February 28, 1948, you did not state to Mr. Ellis in substance and effect that the cash on hand and in banks of 293 thousand dollars, or $293,848.11, was in part Alpine Dairy operation and the remainder personal cash of Hans Forster?

A. No, I have no recollection of it.

Q. Would you say that you did not so state on that occasion on that date the substance of that question in answer to Mr. Ellis?

A. I would say that I did not say that." (R. 2323)

Taylor having denied making such a statement, which disclosed knowledge of $200,000 of appellant's personal cash, appellant offered the testimony of Mr. Ellis in rebuttal. Upon objection to the testimony of Ellis, an offer of proof was made[21] and the offered proof was not received.

The ground of the objection was that the matters raised on cross-examination were collateral. Counsel for appellant pointed out that the offered rebuttal testimony went directly to the question of Taylor's knowledge of appellant's personal affairs (R. 2411).

Again, it must be emphasized that appellant's defense rested upon his claim that Taylor had full knowledge or full access to knowledge of all of appellant's affairs and that Taylor had full responsibility for maintaining financial records and preparing tax returns. Taylor denied that he had any knowledge of any of the appellant's personal affairs and claimed that his work was restricted to certain of appellant's business enterprises. Under the circumstances, testimony that

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[21] "The offer of proof will be, in substance, that Mr. Ellis phoned Mr. Taylor May 5, 1948, and discussed with him the financial statement dated February 29, 1948, which had been submitted to the bank; that this was not a secret conference in any manner; that the specific items in the statement were discussed, and among them was the item of cash on hand, and in the bank of $293,848.11; that Taylor stated to the witness that of the cash on hand and in banks a part of it was Hans's personal cash, and the remainder belongs to the Alpine Dairy operation." (R. 2406)

Taylor had displayed to a bank officer knowledge that appellant possessed $200,000 in cash goes to the heart of the defense of Forster and the defense of Taylor. The defenses of these two defendants were inconsistent and the jury found appellant guilty and Taylor innocent.

**(4) *The testimony of Vern Egenes***

Alterations in the records of various of appellant's enterprises played an important part in this case. The evidence showed that such alterations had taken place in the records of Renton Ice and Ice Cream Company (R. 2763-2767) and Issaquah (R. 242-245). Defendant's Exhibit A-44 was a financial statement of Finstad & Utgard which had been identified by Mrs. Simonson, formerly a bookkeeper for that company and a witness for the appellant (R. 398-399). This exhibit discloses an alteration in accounts payable of $10,000. Mrs. Simonson testified that she had not made any such alteration (R. 399-410).

On cross-examination, Taylor denied that he had made this alteration and stated that it had been made by Egenes, the general manager of Finstad & Utgard (R. 2113-2115, 2307).

Egenes was therefore called as a rebuttal witness and testimony was offered that he had not made the alteration in question. This offer of proof was rejected as improper rebuttal (R. 2416-2419).

Even though it went to the vital question of who had altered the books, the last word heard on this subject was the testimony of Taylor that Egeness had made the alteration.

Defendant's Exhibit A-122 was a statement of 1947

bonuses paid to Finstad & Utgard milk shippers, in January, 1948. Taylor had testified under cross-examination that the change by Egeness in accounts payable was made to reflect $10,000 in bonuses paid to shippers for the year 1947 (R. 2115, 2307). On re-direct examination of Taylor, defendant's Exhibit A-122 was admitted showing bonus payments for the year 1947 in the sum of $2,139.55. Taylor then testified to the effect that this statement did not include all bonuses paid (R. 2375-2377).

Appellant offered to prove through the rebuttal testimony of Egenes that the total bonus was in fact $2,139.55 as shown in Exhibit A-122; that no further bonuses were paid with respect to the year 1947; that therefore there could be no proper adjustment of $10,000 to the books. Objection to this testimony was sustained despite the offer of proof (R. 2416-2419).

The alteration in Exhibit A-44 and the authenticity of Exhibit A-122 are inseparably tied together. If Taylor's explanation of why the adjustment was made failed, it would become clear that he had made the adjustment and that there was no proper purpose.

Once more, the testimony of Taylor was left uncontradicted. Once more, counsel for Taylor argued the matter to the jury:

> "Now, certain other items should be mentioned. In the Finstad & Utgard inventory and accounts payable, there were certain changes made. Now, the increase in accounts payable was due to bonuses which were owed to farmers for milk and it is admitted here that at the end of the year, there were bonuses owed to these farmers for milk that

wasn't reflected in the books. When Mrs. Simonson prepared her statement from the books, showing her accounts payable, this liability was not in there, and it was a liability of the company. It should have been reflected in the statement if it was going to be an accurate reflection of this business.

"Now, the amount was uncertain. It hadn't been computed at the end of the year, and in prior years, as you will find from the Finstad & Utgard ledger here, if you will look at it, the amount would actually run over ten thousand dollars, so that this figure was carried on as the estimated amount at the end of the year in accordance with the past history and it was based on actual liability that actually existed at the end of the year." (R. 2604)

Appellant's offer of proof, if accepted, would have destroyed the basis for this argument and would have placed appellant in a position clearly to argue the responsibility of Taylor for these alterations. From that the inference would inescapably have followed that the other matters of alteration referred to in the prosecution of this case were done at the behest and upon the responsibility of Taylor.

**E. Summary**

Appellant contends that in every respect the rebuttal testimony offered and refused complies with the standards of admission.

Whether an accountant may give two different statements to two different persons for the same enterprise for the same date goes directly to Taylor's skill and competence and hence to his credibility.

Appellant should have been permitted to rebut the testimony of Taylor that accounts receivable may be considered as cash on hand and in banks, and the rebuttal would have gone not only to Taylor's testimonial qualifications; but under the circumstances in which the question arose, it went directly to the issue of Taylor's knowledge of Forster's personal cash position.

If the witness Ellis had been permitted to testify to the meeting of May 5, 1948, there would have been further evidence that Taylor knew of Forster's cash position. Such testimony went directly to Taylor's defense of lack of knowledge and therefore absence of responsibility.

The offered testimony concerning alterations in the books of Finstad & Utgard would have established Taylor's complicity and, hence, his responsibility and would have tended to link Taylor with other alterations which were among the most serious charges brought by the government.

The rulings on the rebuttal testimony offered by the appellant left substantial portions of the testimony of Taylor uncontradicted. Counsel for Taylor took advantage of this fact by arguing to the jury that Taylor stood uncontradicted on those matters which the court had not permitted appellant to contradict him. For that reason, after the final argument of counsel for Taylor, appellant moved once more to re-offer its rebuttal testimony and this motion was denied (R. 2623-2626). Appellant's offered rebuttal testimony was refused in the closing days of a lengthy trial, after the defendant Taylor had submitted his own case. Appellant submits that

the testimony was in every respect admissible and that appellant was vitally prejudiced by its refusal.

**III. The Trial Court Erred in Denying Appellant's Motion for Mistrial Based Upon Charges Contained in the Opening Statement of Counsel for Defendant Taylor and Directed Against Counsel for Appellant**

**A. The nature of the charges and the failure of proof in support thereof**

Appellant was indicted together with his accountant Taylor and his bookkeeper Erickson upon nine counts charging wilful and knowing attempts to defeat and evade income tax in the filing of corporate and personal returns for the calendar years 1945 through 1949. None of the defendants at any time denied that the returns as filed were incorrect or that the amounts of tax stated in the indictment were due. The defense of appellant was a denial of the element of wilfulness, based upon complete reliance upon his bookkeeping departments which were under the supervision of the defendant Taylor and upon the accuracy of the tax returns prepared by Taylor.

In his opening statement counsel for Taylor told the jury that the evidence would show that Taylor possessed limited knowledge only of the business operations of appellant and no knowledge of appellant's personal affairs.

Counsel for Taylor then went on to charge in his opening statement (R. 87-89) that Taylor had been included in the indictment as the result of a conspiracy between appellant and his attorney, George F. Kachlein, Jr., to "frame" Taylor and place the blame for

shortages upon him. Kachlein thereupon withdrew as counsel for appellant (R. 93, 1176).

The charge contained in this opening statement may be summarized as follows:

1. That Taylor was the victim of a deliberate campaign on the part of appellant and Kachlein to make him the scapegoat for understatements of tax.

2. That Taylor, being then personally represented by Kachlein, had been advised by Kachlein to plead guilty to charges of income tax evasion arising out of his personal tax returns as a part of the alleged conspiracy (R. 87).

3. That Kachlein had represented appellant prior to Taylor's guilty plea (R. 87).

4. That while Taylor had been in prison, Kachlein had gone to Taylor's home and gone through Taylor's personal files and papers in furtherance of the alleged conspiracy (R. 88).

5. That Kachlein had claimed privilege for Taylor's personal files and papers upon demand for production by revenue agents in connection with the instant case (R. 88).

6. That Kachlein had given directions to Taylor's employees during Taylor's absence in prison (R. 88).

7. That Kachlein had advised Taylor to take a vacation during a critical period in the pendency of the investigation of this case (R. 88).

8. That Kachlein had told the revenue agents that Taylor was responsible for any understatements in the tax returns of appellant and appellant's corporate en-

terprises and that appellant had changed his testimony regarding Taylor's responsibility after the first meeting with revenue agents (R. 89).

At the conclusion of the opening statements and prior to the admission of any testimony in this case, counsel for appellant moved for a mistrial on the ground that the attack upon appellant's counsel, even assuming the truth of any statements made, was utterly immaterial to the trial of any of the issues before the court (R. 93). This motion the court denied (R. 95-96).

Any discussion of the legal issues arising out of this motion and its denial must be based upon an analysis of the charges and a consideration of the total failure of any evidence to substantiate these charges. The evidence in fact clearly showed that when the conflict of interest became apparent, Kachlein offered his services first to Taylor as his prior client and the decision that Kachlein should continue to represent Forster was made by Taylor (R. 2218, 2500-2502). This evidence alone should clearly negate any claim of a conspiracy against Taylor.

1. ***The charge that Taylor pleaded guilty to charges of evasion of personal income tax upon the advice of Kachlein in furtherance of the alleged conspiracy***

Taylor testified that his personal income tax returns had been investigated in August, 1948, and that he had pleaded guilty in 1950 to one count of tax evasion. At that time he was represented by Kachlein (R. 1595). Taylor admitted that: "I was short in my reporting" and explained:

"I took the position that it was not intentional, it

was carelessness, and that I did not feel that I had committed any fraud intentionally." (R. 1596)

Again, on cross-examination, Taylor admitted that there was a substantial understatement of tax in his personal returns (R. 2187). Again he pleaded that: "It was just a careless situation that developed" (R. 2189). Since Taylor was licensed public accountant of long standing and since there was no denial whatever that his personal income tax returns disclosed substantial undestatements, it appears from the record that Kachlein's advice to enter a plea of guilty to one count of tax evasion (R. 2189) was well founded. The whole record contains no evidence which would controvert the soundness of this advice.

**2.** ***The charge that Kachlein had represented appellant prior to Taylor's plea of guilty***

Taylor pleaded guilty to the charge of income tax evasion on March 2, 1950, and was sentenced on April 25, 1950, to six months. He was released on September 10, 1950 (R. 1597). Counsel for Taylor, in his opening statement charged that Kachlein had represented appellant prior to this plea in an attempt to show that the plea was in furtherance of the alleged conspiracy.

In support of this charge, Taylor testified that he had turned over certain corporate proceedings of Finstad & Utgard, one of appellant's corporations, to Kachlein in September or October of 1949. The purpose was not stated (R. 1595).

Kachlein testified that Taylor called him by telephone on March 29, 1950 (following Taylor's plea of guilty) in order to arrange a meeting with appellant

whom Kachlein at that time had never met (R. 2457). He first met appellant at a conference held on March 30, 1950, and attended by appellant, Taylor and himself (R. 2458).

Kachlein denied that he had received any books and records of Finstad & Utgard or any other of appellant's enterprises prior to March 30, 1950, and testified that the conference had included a general introduction to the scope and nature of appellant's enterprises and a specific problem dealing with the stock of Finstad & Utgard (R. 2459).

Appellant testified that he had neither met nor conferred upon any matter with Kachlein prior to the latter part of March, 1950 (R. 1425).

**3. *The charge that Kachlein went to Taylor's house and went through Taylor's personal files and records in furtherance of the alleged conspiracy***

In his opening statement, counsel for Taylor stated:

> "We will show you that during this period he went out to Mr. Taylor's house, Mr. Taylor being in the federal penal pen, and talked to his wife and gave his wife to understand that he was still working on something involving Mr. Taylor's own personal case and went through his personal files and removed papers therefrom." (R. 88)

The facts were, as shown by Taylor's testimony, that Taylor had given Kachlein a power of attorney to represent him before the Treasury Department (since the question of civil liability was raised by the criminal charges) (R. 1595); that Kachlein had filed a protest against an assertion of deficiencies in May of 1950 and was still handling this matter upon Taylor's return

from prison on September 10, 1950 (R. 1599). Taylor further testified on cross-examination that Kachlein had arranged with the Bureau of Internal Revenue to file a skeleton protest to protect the record until he could confer with Taylor upon Taylor's release from prison (R. 2209).

In substantiation of Taylor's testimony, Kachlein testified that in the latter part of May he had prepared protests relating to certain asserted tax deficiencies of Mr. and Mrs. Taylor; that he had arranged with the bureau for permission to file a supplemental protest after Taylor's return from prison; that he met with Mrs. Taylor and asked to see certain work papers and books which were necessary to the compilation of the protest (R. 2475-2478). The record contains Taylor's letter to Kachlein requesting him to prepare this protest (R. 2480-2481). Kachlein further testified that the papers which he examined in this connection had no relationship to the examination of appellant and related only to Taylor's personal income tax returns (R. 2478). The record is devoid of any evidence that this was not the case.

**4.** ***The charge that Kachlein claimed privilege as to books and records of Taylor in furtherance of the alleged conspiracy***

In his opening statement, counsel for Taylor stated:

> "We will show you that when the Revenue Agent demanded possession from this attorney of Mr. Taylor's personal files, Mr. Taylor still being away, that this attorney claimed privilege as Mr. Taylor's attorney for those records even though he was then appearing before the Revenue Agents and in-

sisting that Mr. Forster's troubles should all be blamed on Mr. Taylor." (R. 88)

Such a claim of privilege on behalf of Taylor could hardly evidence the alleged conspiracy.

**5.** ***The charge that Kachlein gave directions to Taylor's employees***

Counsel for Taylor further charged that:

> "We will show you Ladies and Gentlemen that he was giving directions to the accountants in Mr. Taylor's office on behalf of Mr. Taylor during this same period * * * " (R. 88-89)

Taylor's own evidence showed that he had two associates in his accounting practice and that Kachlein had worked out a temporary arrangement for the handling of fees during Taylor's absence in prison pending Taylor's return (R. 1601).

The Kachlein memorandum introduced into evidence by counsel for Taylor contained the following:

> "As this is but a temporary measure pending Mr. Taylor's return, all matters will be subject to adjustment upon his return." (R. 1601-1602, Defendant's Exhibit A-74)

To substantiate the testimony of Taylor, Kachlein testified that it was necessary to protect Taylor against a charge of receiving fees for accounting services while he was in the penitentiary and had been suspended by the state accounting board. He had therefore drawn up a temporary arrangement which would safeguard Taylor's position and yet be subject to his final approval (R. 2484-2487).

**6.** ***The charge that Kachlein advised Taylor to take a vacation during a critical period in the investigation in furtherance of the alleged conspiracy***

Counsel for Taylor charged that:

> " * * * when Mr. *Forster* came back from the penal camp in 1950 this attorney advised Mr. Taylor to take a long vacation, right during the critical period in this investigation * * * " (R. 89)

Kachlein freely testified that Mrs. Taylor had planned such a trip and had asked his advice on or about August 29, 1950, prior to Taylor's return from the penitentiary; that he approved, believing that such a vacation would help Taylor to regain his composure and status in the community. This suggestion was made prior to any indication of a claim of criminal liability against Taylor in this case (R. 2490-2493).

**7.** ***The charge that Kachlein had stated to the revenue agents that Taylor was responsible for deficiencies in tax returns of appellant and appellant's corporate enterprises***

The final charge leveled against Kachlein in the opening statement was that he had himself, and had caused appellant, to make statements to the revenue agents to the effect that the responsibility for the state of appellant's books and records and tax returns lay with Taylor (R. 88-89).

Revenue agent Marx testified that at his first meeting with Kachlein on appellant's case, Kachlein had observed that if accounting errors had been made, it was undoubtedly due to sloppy accounting work on the part of Taylor (R. 354-355). Kachlein testified that Marx had worked on Taylor's personal case and was familiar

with Taylor's accounting habits and practices (R. 2515). Taylor himself had pleaded carelessness and negligence in his own testimony (R. 1596-1597, 2189).

Kachlein testified as to his own acquaintance with the quality of Taylor's work (R. 2439-2442). He related how he had taken the position on behalf of Taylor in Taylor's personal evasion case that there was no wilfulness involved and that the understatements had resulted from negligence and inability to cope with the quantity of work which he had undertaken (R. 2442-2448). Kachlein therefore agreed that he had stated to revenue agent Marx on April 26, 1950, that errors in the Forster books may have been the result of similar negligence and carelessness. Such statements were made in defense of Taylor as well as appellant (R. 2489). As Kachlein testified under cross-examination by counsel for Taylor:

> "Q. Did you—did it not make you believe that there was a conflict in your representation of these two parties when you made such a statement?
>
> A. No, I didn't think so, because sloppy bookkeeping didn't mean fraudulent transactions." (R. 2514)

Taylor's counsel then charged that appellant had first exonerated Taylor, stating appellant had said to the revenue agents at their first meeting on April 26, 1950:

> " * * * that if there were any difficulties with his returns — any income that was not reported — it could not be Mr. Taylor's fault * * * " (R. 89)

A careful reading of the testimony of revenue agent Marx on this subject (R. 355-356) will show that ap-

pellant's statement was limited to certain personal items only. And this charge is basically inconsistent with the prior charge that the conspiracy was in full swing at and before the day that Taylor personally pleaded guilty (March 2, 1950).

**8. *The termination of the Kachlein-Taylor relationship conclusively disproved the alleged conspiracy***

Although the previous summary demonstrates the absence of any evidence in support of a theory of conspiracy between appellant and Kachlein, to make Taylor the scapegoat, the clearest evidence that no such conspiracy existed is found in the facts relating to the termination of Kachlein's representation of Taylor.

Kachlein testified that he first recognized the possibility of a conflict in interest between representation of Taylor and appellant on the 23rd or 24th of October, 1950, after a trip to the Issaquah Creamery Co. had disclosed certain manipulations of the books of account (R. 2512). On October 26, 1950, he had a lengthy conference with revenue agents Eppler and Marx which further strengthened his realization that such a conflict did exist (R. 2513). He had not realized the existence of such a conflict on September 13, 1950, when he had conferred with Taylor upon Taylor's return from the penitentiary (R. 2523-2525).

Kachlein therefore conferred with Taylor on October 27, 1950. He outlined the conflict of interest and offered to represent Taylor and withdraw from the representation of Forster. His testimony on this point is as follows:

" * * * as a lawyer sometimes finds himself in the

place where you have two people that you have done work for, it was essential for me either to withdraw entirely from the case or, with the consent of both parties, represent one, and that he being the first client in time he would have—if Mr. Forster approved I could represent Mr. Taylor, or, if Mr. Taylor felt it would be better I represent Mr. Forster, with his approval I could represent Mr. Forster." (R. 2500-2501)

It was at this point that Taylor made the choice that Kachlein should continue to represent Forster, and upon the advice of Kachlein, Taylor engaged Mr. LeSourd who served as his counsel at the time of trial (R. 2501-2502).

The record is conclusive upon the testimony of Taylor that first choice in the matter of representation was granted to him and that of his own volition he yielded to Forster (R. 2179, 2218).

**B. Appellant's motion for mistrial based upon statements contained in the opening argument of counsel for defendant should have been granted because the issue raised was irrelevant, immaterial and incompetent**

"A fundamental test of relevancy is whether the conclusion sought to be established is a probable inference from the offered fact." *Guthrie v. United States* (C.A.D.C., 1953) 207 F.(2d) 19, 24.

The indictment charged that the three defendants had wilfully and knowingly attempted to defeat and evade a large part of taxes owing by the appellant or his corporations. There was no question that the returns had been filed and that they contained substan-

tial understatements of tax due. The issue in this case was whether there had been knowing and wilful attempts to evade taxes contrary to statute * * * and, if so, by whom.

The conclusion sought to be established on either side in this case was that the conduct of the various defendants had or had not been wilful. None of the matters outlined in that portion of Taylor's opening statement wherein appellant and his attorney were accused of fomenting a conspiracy against Taylor could have created inferences that the conduct of Taylor either was or was not wilful. All of those matters took place after the last return had been filed upon which the indictment was based.

Even had it been true that Kachlein had represented Forster prior to Taylor's plea of guilty (and the evidence was otherwise), that fact did not tend to prove Taylor's lack of wilfulness in connection with the tax returns in question. The same is true of Taylor's plea of guilty to charges of evasion in his own personal returns. Likewise, the charge that, during Taylor's penitentiary sentence, Kachlein had spoken to Mrs. Taylor, had gone through Taylor's personal files and removed papers admittedly in connection with Taylor's personal affairs, would hardly tend to raise any inference connected with Taylor's wilfulness or lack of wilfulness in the filing of the tax returns set forth in the indictment. The fact that Kachlein gave certain directions to accountants in Taylor's office during Taylor's penitentiary sentence concerning fee arrangements had no logical connection whatever with the issues raised by

the indictment, and the same is true of Kachlein's advice to Taylor to take a vacation after the completion of his prison sentence. Nothing could be more remote from the issue raised by the indictment than the charge that Kachlein had claimed privilege on behalf of certain personal files of Taylor when the revenue agents sought possession of them.

Finally, the charge that Kachlein had placed the responsibility for the shortages set forth in the indictment upon Taylor did not and could not of itself tend to prove or disprove whether or not those shortages were the result of wilful conduct on the part of Taylor. The test must necessarily be the intent and state of mind of Taylor at the time the returns in question were prepared and filed and not any statements made by an attorney at a subsequent date.

Not only did the evidence outlined in this portion of the opening statement for defendant Taylor fail to meet the tests of relevancy; it was clearly immaterial and incompetent. Even evidence which has some logical tendency to affirm or deny the fundamental issue may be inadmissible on other grounds. This is especially true where the probative value of the proffered evidence is slight as compared to the disadvantages inherent in it. Thus, evidence which may be logically relevant may unduly confuse the issues or create undue prejudice. Wigmore on Evidence, 3rd Edition, §29(a), 42.

In *United States v. Krulewitch* (C.A. 2, 1944) 145 F.(2d) 76, 80, the court said:

> "In short, that if evidence is relevant to prove one crime, it does not become inadmissible because

> it also proves another. Such is indeed the law; yet, here as always, the competence of evidence in the end depends upon whether it is likely, all things considered, to advance the search for the truth; and that does not inevitably follow from the fact that it is rationally relevant. As has been said over and over again, the question is always whether what it will contribute rationally to a solution is more than matched by its possibilities of confusion and surprise, by the length of time and expense it will involve, and by the chance that it will divert the jury from the facts which should control their verdict * * * "

The trial of this case afforded a supreme example of the confusion of issues when it degenerated over lengthy periods of time into a trial of the conduct of George Kachlein rather than the appellant and his co-defendants. Few issues could have more severely prejudiced the appellant. The basic charge in the indictment was fraud; and the essence of the charge against appellant and Kachlein was another fraudulent conspiracy to shift to Taylor the blame for the admitted understatements.

**C. The misconduct of Taylor's counsel in inserting this issue into the case is ground for reversal**

When all the evidence had been heard, the existence of any conspiracy was conclusively disproved. Certainly Kachlein had advised Taylor to plead guilty; on his own testimony there was no other alternative. In talking with Mrs. Taylor and preparing a protest relating to Taylor's civil tax liabilities, Kachlein was clearly acting in the interest and to the benefit of Taylor and the same is true of the arrangement he devised

for the division of accountants' fees by Taylor's associates during Taylor's incarceration. This matter relating to the division of accountants' fees is a clear indication of how far-fetched was the initial charge and how prejudicial and injurious the effect of permitting the evidence and the issue to go to the jury.

The point at which this charge of conspiracy failed utterly was Taylor's own admission that he had the first call upon Kachlein's services and that Kachlein continued to represent appellant only upon Taylor's advice (R. 2179, 2218). Surely, no conspirator would willingly offer to become the victim of his own conspiracy.

The courts have always been zealous to protect criminal defendants against improper conduct on the part of opposing counsel, whether in argument, cross-examination or other phases of the presentation of the case. The present case is unusual in that the improper conduct is on the part of counsel for a defendant rather than the prosecuting attorney; but there should be no difference in principle if the rights of the appellant have been prejudiced.

In considering the charges levelled against Kachlein, it is necessary to appreciate the importance of the lawyer in litigation as recognized by Judge Frank in his dissenting opinion in *United States v. Antonelli Fireworks Co.* (C.A. 2, 1946) 155 F.(2d) 631, 653, 654:

> "Applying the usual 'harmless error' doctrine, the courts generally hold that improper remarks (or other similar misconduct) of counsel will be deemed to have induced the verdict (Berger v. United States, 295 U.S. 78, 85-89, 55 S.Ct. 629, 79

> L.Ed. 1314) and to require reversal. For such remarks may affect the jury even more than erroneously admitted evidence. Close students of the subject, such as Morgan, tell us that today, unfortunately, a jury trial usually is 'a game in which the contestants are not the litigants but the lawyers.' An experienced trial lawyer writes: 'It is a well recognized fact that in most cases the jury 'tries' the lawyers rather than the clients * * * The personality of the lawyer is constantly before the jury and he gradually absorbs the client's cause to such an extent that unconsciously in the minds of the jury it becomes the lawyer's cause'."

In *Berger v. United States,* 295 U.S. 78, 85, the Supreme Court reversed a conviction where the prosecuting attorney had been guilty of misstating facts in cross-examination, of suggesting by his questions that statements had been made to him personally out of court in respect of which no proof was offered, of assuming prejudicial facts not in evidence and in general of conducting himself in a "thoroughly indecorous and improper manner." It is vital to note the Supreme Court's statement that:

> "The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury."

The Supreme Court found prejudice under the circumstances "so highly probable" that it awarded a new trial.

See also *Pierce v. United States* (C.A. 6, 1936) 86 F. (2d) 949, 952, reversed because of the improper conduct of the prosecuting attorney.

In *New York Central Railroad Co. v. Johnson,* 279 U.S. 310, 318, counsel for the plaintiff had argued that the defendant had attempted to raise as a defense that plaintiff's disabilities were caused by syphilis. There was no foundation in the record for such a charge. In reversing the judgment for plaintiff the Supreme Court said:

> "Such a bitter and passionate attack on petitioner's conduct of the case, under circumstances tending to stir the resentment and arouse the prejudice of the jury, should have been promptly suppressed. . . . The failure of the trial judge to sustain petitioner's objection, or otherwise to make certain that the jury would disregard the appeal, could only have left them with the impression that they might properly be influenced by it in rendering their verdict, and thus its prejudicial effect was enhanced. . . . That the quoted remarks of respondents' counsel so plainly tended to excite prejudice as to be ground for reversal is, we think, not open to argument." (citations omitted)

*Read v. United States* (C.A. 8, 1930) 42 F.(2d) 636, 645, involved the alleged misapplication of bank funds. The prosecuting attorney had sought to argue, outside of the evidence, that the defendants had preserved their personal fortunes while the innocent depositors had suffered. The circuit court reversed the conviction because of counsel's improper argument and cited *New York Central Railroad Co. v. Johnson, supra,* adding:

> "This was a civil action, and it is much more important that prejudice be not aroused in a criminal action than it is in a civil one."

In *Brown v. Walter* (C.A. 2, 1933) 62 F.(2d) 798, 799-800, the court said:

> "We should therefore hardly have passed the verdict, had the matter rested there; but the injustice became much more serious, when the plaintiff came to sum up. Then he spun a web of suspicion of which there was no warrant whatever. He argued with much warmth that the whole defense had been fabricated by the insurer—transparently veiled by such provocative phrases as 'unseen hand,' and an 'unseen force,' and the like. This had not the slightest support in the evidence; it was unfair to the last degree. Nobody can read the summation without being satisfied that the real issues were being suppressed, and the picture substituted of an alien and malevolent corporation, lurking in the background and contriving a perjurious defense. A judge, at least in a federal court, is more than a moderator; he is affirmatively charged with securing a fair trial, and he must intervene sua sponte to that end, when necessary. It is not always enough that the other side does not protest; often the protest will only serve to emphasize the evil. Justice does not depend upon legal dialectics so much as upon the atmosphere of the courtroom, and that in the end depends primarily upon the judge."

In *Woolworth Co. v. Wilson* (C.A. 5, 1934) 74 F.(2d) 439, 442-443, counsel for the plaintiff stated in argument that "they trumped up the whole case." Judgment for plaintiff was reversed, the Court of Appeals stating:

> "The fact must be very plain to ever justify a lawyer in declaring his opponent's case to be trumped up."

Other cases in which the misconduct of counsel has

led to reversal are legion: *Latham v. United States* (C.A. 5, 1915) 226 Fed. 420; *Skuy v. United States* (C.A. 8, 1919) 261 Fed. 316; *Volkmor v. United States* (C.A. 6, 1926) 13 F.(2d) 594; *Robinson v. United States* (C.A. 8, 1928) 32 F.(2d) 505; *Pharr v. United States* (C.A. 6, 1931) 48 F.(2d) 767; *Towbin v. United States* (C.A. 10, 1938) 93 F.(2d) 861; *Missouri-K.-T. Railroad Co. v. Ridgway* (C.A. 8, 1951) 191 F.(2d) 363; *Minker v. United States* (C.A. 3, 1936) 85 F.(2d) 425; *Levinson v. Fidelity & Casualty Co. of New York* (Ill.) 181 N.E. 321; *Masterson v. Chicago & Northwestern Railway Co.* (Wisc.) 78 N.W. 757.

**D. Improper statements contained in the opening argument of counsel for Taylor could not be cured by the court's instruction**

At the close of the opening arguments the court made the following statement (R. 91-92):

> "Before we recess, I think the Court should advise you as to all opening statements made on behalf of the Government and all Defendants, that the purpose of an opening statement is to outline the theory of the case that the particular Plaintiff or particular Defendant proposes to take in the case.
>
> "Likewise, they outline the evidence as they believe it will be established or as it will be brought out in the course of the trial.
>
> "Occasionally opening statements may border on argument and that isn't intentional but it is sometimes difficult for a lawyer to limit himself to a statement of his theory and proof without going into argument, but the caution I want to give you at this time is this: That you are not to consider

> opening statements as evidence of any kind but merely as being helpful to your understanding of the evidence as it comes in and, of course, the proof as it is brought out in the course of testimony and through exhibits constitutes the evidence which you will consider finally in determining the guilt or innocence of these defendants."

Appellant thereupon made his motion for mistrial based upon the opening statement of counsel for Taylor and the motion was denied (R. 93-95).

Appellant was thus forced into meeting the charges advanced by Taylor. This was true because even a successful effort to exclude evidence in support of the opening statement's charges could not have effaced from the memory of the jury the nature of the charges themselves. From a practical standpoint, the motion for mistrial having been denied, appellant had no real choice in the presentation of his case and was forced into issues which created confusion and prejudice.

As the court said in *Berger v. United States, supra*:

> "The trial judge, it is true, sustained objections to some of the questions, insinuations and misstatements, and instructed the jury to disregard them. But the situation was one which called for stern rebuke and repressive measures and, perhaps, if these were not successful, for the granting of a mistrial. It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken."

In *Robinson v. United States, supra,* the court said at p. 508:

> "There are times when no admonition or instructions of the court can remove from the jury's

mind the effect of improper conduct and remarks of counsel, and we think this is true in this case. These principles are supported by the authorities." (Citations omitted)

And in *Volkmor v. United States, supra,* the court said:

"Whether there has been a correction of the abuse of argument by a withdrawal of the objectionable parts of it depends upon whether on considering the whole case the error appears to have been so serious that it likely affected the minds of the jury despite the attempted correction by counsel or court. . . . If, however, upon a consideration of the whole case, the error appears so egregious as to have affected the minds of the jury, despite the attempted correction, the verdict must be set aside. This case strikingly illustrates the justice of that rule." (p. 595)

For the same proposition, see also *Latham v. United States, supra; Pharr v. United States, supra; Levinson v. Fidelity & Casualty Co. of New York, supra.*

The proper action for the trial court after appellant's motion for mistrial at the conclusion of the opening arguments is indicated by *Minker v. United States, supra,* at p. 427:

"We think that the entire tenor of the prosecuting attorney's statements was decidedly and unfairly prejudicial. It may be noted that in the instant case the jurors who heard the prosecuting attorney's over-zealous and prejudicial remarks might have been withdrawn and a new jury impaneled immediately thereafter to hear the case against the appellant without prejudice to the government's position."

**E. The trial court should have declared a mistrial at the conclusion of the evidence**

Appellant's motion for a mistrial (R. 93) having been denied (R. 95), evidence was heard on the charges of conspiracy leveled against appellant and Kachlein. When the testimony revealed no substance in support of these charges, the trial court should have declared a mistrial of its own motion. The outline of testimony contained in pages 70 to 80 of this brief shows that the charges were groundless and, as has been previously stated, that the ultimate choice of counsel lay in the hands of Taylor (R. 2501, 2179, 2218).

In *VanGorder v. United States* (C.A. 8, 1927) 21 F. (2d) 939, 942, the court said:

> "But, since the decision of the Supreme Court in Wiborg v. United States, 163 U.S. 632, 659, * * *, there has been and still exists an alleviation in the interest of justice of the strict rule and practice that no relief whatever may be granted by the federal appellate courts, except on recorded objections or exceptions to rulings in the trial courts, to the effect that in criminal cases involving the life or liberty of the accused the appellate courts of the United States may notice and correct, in the interest of a just and fair enforcement of the laws, serious errors in the trial of the accused fatal to the defendant's rights, although those errors were not challenged or reserved by objections, motions, exceptions, or assignments of error."

That rule was again emphasized in *New York Central Railroad Co. v. Johnson, supra,* where the court stated at p. 318:

> "Respondents urge that the objections were not

> sufficiently specific to justify a reversal. But a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy . . . of no importance to the public.' The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice. . . . Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this court from correcting the error." (Citations omitted)

In *Read v. United States, supra,* no exceptions were taken to the remarks of the prosecuting attorney which were later held prejudicial by the circuit court. On the authority of *VanGorder v. United States, supra,* and *New York Central Railroad Co. v. Johnson, supra,* the conviction was nevertheless reversed.

The duty of the trial court to act of its own motion to prevent prejudice and secure a fair trial, even in the absence of objections, motions or other action by counsel is emphasized in the following cases: *Johnston v. United States* (C.A. 9, 1907) 154 Fed. 445; *Skuy v. United States, supra; Volkmor v. United States, supra; Brown v. Walter, supra; Berger v. United States, supra; Masterson v. Chicago & Northwestern Railway Co., supra.*

The recent decision of this court of *Herzog v. United*

*States* (C.A. 9, 1955) 226 F.(2d) 561, does not change the rule announced by these cases. The *Herzog* case deals with the relationship of Federal Rules of Criminal Procedure 52 (b) and 30. Rule 52 (b) preserves to litigants plain error or defects affecting substantial rights, although they were not brought to the attention of the court. Rule 30 provides that no party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict. The holding of this court in the *Herzog* case was that the appellate courts may not consider under Rule 52 matters which another rule specifically states shall not be assigned as error.

No portion of the Federal Rules of Criminal Procedure precludes this court from considering the failure of the trial court to grant a mistrial at the close of the evidence, even in the absence of any motion therefor by the appellant. Appellant submits that the charges brought against appellant and his counsel in the opening statement of Taylor's counsel were irrelevant, immaterial and incompetent and should have occasioned a mistrial upon appellant's motion. Appellant further submits that the evidence failed completely to support these contentions which imported a maximum of prejudice against appellant into the case and thoroughly confused the fundamental issues. On this record, therefore, it is competent for this court to notice the effect of this issue upon the trial and the trial court's failure to cure the difficulty in the only way possible after the evidence had been submitted—by declaring a mistrial.

**F. The trial court erred in refusing appellant's motion for a new trial**

Appellant's motion for a new trial (R. 16-17) included in its grounds "errors of law during the trial to which exception was duly taken."

Exception was duly taken to the conspiracy charges in the opening statement of counsel for Taylor by means of appellant's motion for a mistrial. On appellant's motion for new trial, the court had not only heard the evidence, but it had seen the extraordinary result of the trial which resulted in the conviction of appellant and the acquittal of Taylor. For all of the reasons already set forth, it was error for the trial court to enter its order denying appellant's motion for acquittal and in the alternative for a new trial (R. 17-18).

## CONCLUSION

For the reasons stated, the judgment of guilty as to appellant should be reversed and the cause remanded for a new trial.

Respectfully submitted,

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